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# DISSERTATION

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„Institutional, Statutory and General Mediation Rules for International Dispute  
Settlement“

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Mag. iur. Evelyn Zach, LL.M., M.A.

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## 1. Introduction

On March 18, 2008, Lovells, an international law firm, released a report on how European in-house counsel are managing international disputes and identified the current trends in dispute management.<sup>1</sup> Based on a survey of 180 in-house lawyers in Europe's largest companies in France, Germany, Italy, the Netherlands and England, the report concludes that more respondents (38%) say that over the last three years the volume of disputes had increased rather than decreased (14%).<sup>2</sup> Another key finding is that commercial/contractual disputes are considered to present the greatest overall risk (75%).<sup>3</sup> According to the report, the top trend in dispute management over the last three years is the increasing use of alternative dispute resolution. Asked to describe what they see as the major trends in dispute resolution over the last three years, nearly a third of respondents (31%) identified increased use of negotiations, mediation, arbitration, and alternative dispute resolution among their answers.<sup>4</sup>

Not only multinational companies but also states and international organisations have recognized the value of methods for settling commercial

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<sup>1</sup> Lovells, The Striking World, Research report: How European in-house counsel are managing multinational disputes (2008), available at <http://www.lovells.com/NR/rdonlyres/DA3B6810-910E-43D2-B8E9-4E4230C99871/0/LovellsTheShrinkingWorldDRReportSpring2008.pdf>.

<sup>2</sup> Lovells, The Striking World, Research report: How European in-house counsel are managing multinational disputes (2008) p. 1, available at <http://www.lovells.com/NR/rdonlyres/DA3B6810-910E-43D2-B8E9-4E4230C99871/0/LovellsTheShrinkingWorldDRReportSpring2008.pdf>.

<sup>3</sup> Lovells, The Striking World, Research report: How European in-house counsel are managing multinational disputes (2008) p. 6, available at <http://www.lovells.com/NR/rdonlyres/DA3B6810-910E-43D2-B8E9-4E4230C99871/0/LovellsTheShrinkingWorldDRReportSpring2008.pdf>.

<sup>4</sup> Lovells, The Striking World, Research report: How European in-house counsel are managing multinational disputes (2008) p. 19, available at <http://www.lovells.com/NR/rdonlyres/DA3B6810-910E-43D2-B8E9-4E4230C99871/0/LovellsTheShrinkingWorldDRReportSpring2008.pdf>.

disputes through involvement of a third neutral person assisting them in their attempt to settle their dispute amicably. Mediation proceedings permit the parties to seek a high quality amicable solution to their disputes using a minimum of time and resources. They are intended to be party-controlled, rapid, inexpensive and flexible. Although the process should be as flexible as possible, parties often find it helpful to refer to a procedural framework provided by a set of established rules, like the UNCITRAL, ICC, LCIA, SCCAM, VIAC, CEDR or MEDAL<sup>5</sup> mediation procedure, to bring shape and discipline to the process. Institutional mediation rules refer to the entire mediation process from the initiation until the termination. Apart from institutional rules, which are not part of a national legislation, mediation is often not subject to any domestic procedural law.<sup>6</sup> Especially in Europe, yet, few national laws on mediation exist.<sup>7</sup> This situation will change within the next years. The European Parliament and the Council of the European Union have enacted the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters<sup>8</sup>. According to the Mediation Directive, all Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Mediation Directive before 21 May 2011.<sup>9</sup> Therefore, Member States are now

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<sup>5</sup> See section 4 below.

<sup>6</sup> Some jurisdictions include separate provisions dealing with some issues related to mediation (e.g. confidentiality of mediation) in their Civil Procedure Codes.

<sup>7</sup> E.g. Austria: Mediation Act. The contrary is true for the United States of America, where the Uniform Mediation Act was approved and recommended for enactment in all the States in August 2001. For a brief description of the laws on mediation in Austria, Germany, France, England, Scotland, Wales, Denmark, Sweden, Norway, Finland, Bosnia-Herzegovina, Bulgaria, Croatia, Poland and Slovakia see Filler, *Recht der Mediation im europäischen Vergleich* in *Kleindienst-Passweg/Wiedermann/Proksch, Handbuch Mediation* (2008) register 13, sec. 3.

<sup>8</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal L 136, 24 May 2008, p. 0003–0008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML>.

<sup>9</sup> Art. 12 (1) Mediation Directive.

required to deal with the question of whether its legal system reflects the content of the Mediation Directive. Members of the European Union must in particular adopt procedures to enforce mediation settlement agreements, protect the confidentiality of mediation communications, provide for regulations on suspension of limitation periods and promote training of mediators under the Mediation Directive. The Mediation Directive is intended to increase access to justice by providing an additional mechanism for resolving disputes.

Even though there are considerable efforts underway to make mediation more popular within the environment of international dispute settlement, there is still a long way to go. The honourable words of Sir Anthony Clarke, the Master of the Rolls, in his address to the Second National Conference of the Civil Mediation Council on 8 May 2008 reflects the current status and the path to go for the future:

"Experience ... shows even now that far too many people know far too little about mediation. I think we can all agree that this has to change. ADR [Alternative Dispute Resolution] in general and mediation in particular, where it is the appropriate ADR mechanism, must become an integral part of our litigation culture. It must become such a well-established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required. This will require education: education on the part of litigants, lawyers and the judiciary. Lawyers and Judges will need educating so that mediation becomes part of the culture; so that it becomes second nature to us all."<sup>10</sup>

This paper first provides an overview of basic considerations, which should be borne in mind when deciding about the method of resolving disputes. This paper follows the development of statutory and institutional mediation rules for international dispute settlement. It offers insights into the provisions of the

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<sup>10</sup> Sir Anthony Clarke, the Master of the Rolls, in his address to the Second National Conference of the Civil Mediation Council on 8 May 2008. See Clift, *Mediation: The new European Directive* (2008), available at [www.linexlegal.com](http://www.linexlegal.com).



Austrian Act on Mediation in Civil Matters<sup>11</sup>, the Mediation Directive<sup>12</sup> and discusses the provisions of the Mediation Act in light of the requirements of the Mediation Directive. In addition, it describes several institutional rules including those of UNCITRAL, ICC, LCIA, SCCAM, VIAC, CEDR and MEDAL presenting in an analytical and clear manner the relations and differences behind these mediation provisions.

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<sup>11</sup> Act on Mediation in Civil Matters (Zivilrechts-Mediations-Gesetz, ZivMediatG - hereinafter "Mediation Act") BGBl I 2003/29.

<sup>12</sup> Mediation Directive, supra note 8.

## **2. Basic considerations before opting for mediation**

The purpose of section 2 is to submit a general picture as to which basic issues must be considered prior opting for mediation as a method for dispute settlement. Section 2.1 gives insights about where mediation currently stands as a method of business dispute settlement. Special attention will be paid upon the interaction between mediation and arbitration. Section 2.2 describes the main differences between adversarial processes and mediation. In addition, it sets out some supplementary information about mediation, its use and effectiveness. The description of the three processes is deliberately simplified to provide a snapshot comparison between the three processes "at a glance".<sup>13</sup> Sections 2.3-2.8 deal with specific issues regarding the mediation procedure, from including mediation as a means for dispute settlement into business contracts to enforcing mediation settlement agreements in international environments. Many of the observations in this section about the differences of arbitration, litigation and mediation and the basic issues to be considered prior opting for mediation apply equally wherever they are conducted in Austria, within the European Union or elsewhere abroad under foreign systems of law.

### **2.1 Mediation in international business dispute settlement**

Historically, legal disputes have been resolved either by litigation or by arbitration. Even though mediation has a long history, in international diplomacy, in family and labour relations and in some jurisdictions it is within many countries of the European Union something of a minority method in the resolution of commercial disputes. While for international commercial disputes, arbitration is the most employed alternative to litigation, mediation, as a separate means of dispute settlement, is – at least in most European states –

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<sup>13</sup> There exists extensive literature on the differences between mediation, arbitration and litigation. As per an example, see Brown/Marriott, ADR Principles and Practice (1999), chapters 4-8.

seldom used.<sup>14</sup> A main reason, why mediation is overshadowed by arbitration is that arbitration proceedings lead to a binding decision enforceable in a growing number of countries around the world following the adoption of various international conventions, most notably the New York Convention.

In recent years, there has been much discussion whether to combine arbitration and mediation or to integrate mediation techniques in arbitration proceedings.<sup>15</sup> Different legal systems and various understandings of the role of the arbitrator and the mediator seem to prevent a transnational consensus on how such goal can be achieved. While practitioners from common law jurisdictions commonly see a need for the international arbitration community to embrace ADR, their colleagues from continental Europe are more hesitant.<sup>16</sup> Basically, the difference lies in the way arbitrators and judges conduct adversarial proceedings. While judges and arbitrators in common law jurisdictions see their role confined to reaching a decision on the merits, their colleagues from a civil law background become actively involved in encouraging amicable settlement during the adversarial processes.<sup>17</sup> A survey completed in 2002 by the German practitioners Bühring-Uhle, Scherer and Kirchhoff on the arbitrator's role in

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<sup>14</sup> Dendorfer/Lack, *The Interaction Between Arbitration and Mediation: Vision v Reality* in *SchiedsVZ* 2007, p. 195.

<sup>15</sup> Kaufmann-Kohler/Kun, *Integrating Mediation into Arbitration: Why it works in China* in *Journal of International Arbitration*, Vol. 25 No. 4 (2008) p. 479 et seq.; Fischer-Zernin/Junker, *Arbitration and Mediation: Synthesis or Antithesis?* in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 21 et seq.; Lionnet, *Arbitration and Mediation – Alternatives or Opposites?* in *Journal of International Arbitration*, Vol. 4 No. 1 (1987) p. 69 et seq.; Berger, *Integration of Mediation Elements into Arbitration – 'Hybrid' Procedures or 'Intuitive' Mediation by International Arbitrators* in *Arbitration International*, Vol. 19 No. 3 (2003) p. 391 et seq.; Dendorfer/Lack, *The Interaction Between Arbitration and Mediation: Vision v Reality* in *SchiedsVZ* 2007, p. 195 et seq.

<sup>16</sup> Newmark/Hill, *ADR and International Arbitration: An Evolving Relationship* in Berkeley/Mimms (ed.) *International Commercial Arbitration – Practical Perspectives* (2001) p. 137.

<sup>17</sup> Newmark/Hill, *ADR and International Arbitration: An Evolving Relationship* in Berkeley/Mimms (ed.) *International Commercial Arbitration – Practical Perspectives* (2001) p. 140.

promoting voluntary settlement concluded that 43% of the international commercial arbitration cases were settled by the parties voluntarily without the need for an arbitral award.<sup>18</sup> Berger estimates that the parties bring even approximately 60% of all arbitrations to an end through agreement. 86% of the respondents thought that facilitating a consensual solution is one of the functions of the arbitration process.<sup>19</sup> Practitioners of commercial arbitration in the civil law jurisdiction of Germany are however not convinced that there is a need for mediation as a separate means of dispute settlement. They rather recommend integrating mediation techniques into arbitration or combining mediation and arbitration proceedings. It seems as if ADR has always been part of the arbitral process. Lionnet and Lionnet state that every arbitration proceeding aiming at an amicable settlement includes elements of mediation. Fischer-Zernin and Junker state "there is no need for a "new" system of mediation in international controversies. Instead, the realization that mediation is one of the functions of arbitration should be the future trend."<sup>20</sup> Berger is rather open to accept the benefits of mediation and follows the view to integrate mediation elements into arbitration proceedings.<sup>21</sup> Schiffer also states that

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<sup>18</sup> Bühring-Uhle/Scherer/Kirchhoff, *The Arbitrator as Mediator* in *Journal of International Arbitration*, Vol. 20 No. 1 (2003) p. 83.

<sup>19</sup> See Bühring-Uhle/Scherer/Kirchhoff, *The Arbitrator as Mediator* in *Journal of International Arbitration*, Vol. 20 No. 1 (2003) p. 82. Another, older survey found that the vast majority of the arbitrators responded that mediation was not part of their role and they were opposed to it. See Fischer-Zernin/Junker, *Arbitration and Mediation: Synthesis or Antithesis?* in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 24.

<sup>20</sup> Fischer-Zernin/Junker, *Arbitration and Mediation: Synthesis or Antithesis?* in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 22 and 38 et seq.

<sup>21</sup> Berger, *Integration of Mediation Elements into Arbitration – 'Hybrid' Procedures or 'Intuitive' Mediation by International Arbitrators* in *Arbitration International*, Vol. 19 No. 3 (2003) p. 393 et seq. In China, mediation is frequently used on its own and in combination with adversarial procedures such as litigation or arbitration. See Kaufmann-Kohler/Kun, *Integrating Mediation into Arbitration: Why it works in China* in *Journal of International Arbitration*, Vol. 25 No. 4 (2008) p. 483 et seq.

arbitral tribunals use mediation techniques during amicable settlement talks.<sup>22</sup> Dendorfer and Lack describe mediation as a suitable means for dispute settlement and conclude that there are no obstacles to an interaction between arbitration and mediation that cannot be overcome and state that a combination of both procedures could lead to an enrichment of mediation and arbitration and lead to better outcomes.<sup>23</sup> As stated by Newmark and Hill, it is not that practitioners from civil law jurisdictions do not wish to embrace mediation, but they feel that they are already doing so.<sup>24</sup>

Indeed, the international business community will want the benefits that both processes can offer. Although there is still perhaps a long way to go, the tide has very clearly turned. International commercial arbitration is supposed to, and actually does, foster voluntary settlement.<sup>25</sup> The settlement techniques employed by arbitrators differ in their intensity:<sup>26</sup> Arbitrators may simply undertake conciliation efforts, hold interest focused informal discussions, or suggest the parties to return to the negotiation table and aim at amicable settlement. As per a more intrusive way, arbitrators may deliver their view on the merits of the case to the parties as guidance for settlement discussions.

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<sup>22</sup> Schiffer, *Wirtschaftsschiedsgerichtsbarkeit: Die erfolgreiche außergerichtliche Streitlösung* (1999) p. 30.

<sup>23</sup> Dendorfer/Lack, *The Interaction Between Arbitration and Mediation: Vision v Reality in SchiedsVZ 2007*, p. 195 et seq.

<sup>24</sup> Newmark/Hill, *ADR and International Arbitration: An Evolving Relationship in Berkeley/Mimms (ed.) International Commercial Arbitration – Practical Perspectives* (2001) p. 141.

<sup>25</sup> See Bühring-Uhle/Scherer/Kirchhoff, *The Arbitrator as Mediator in Journal of International Arbitration*, Vol. 20 No. 1 (2003) p. 82.

<sup>26</sup> Bühring-Uhle/Scherer/Kirchhoff, *The Arbitrator as Mediator in Journal of International Arbitration*, Vol. 20 No. 1 (2003) p. 84 et seq. See also Fischer-Zernin/Junker, *Arbitration and Mediation: Synthesis or Antithesis?* in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 34 et seq.; Berger, *Integration of Mediation Elements into Arbitration – ‘Hybrid’ Procedures or ‘Intuitive’ Mediation by International Arbitrators in Arbitration International*, Vol. 19 No. 3 (2003) p. 398 et seq.

Furthermore, parties may ask the arbitrator for informal settlement proposals.<sup>27</sup> In certain cases, an arbitrator may act as mediator.

There has been a veritable explosion of interest in mediation and a substantial growth in the number of mediation service providers nationally and internationally. The use of mediation to resolve international business disputes has reached international arbitration organizations.<sup>28</sup> Institutions such as UNCITRAL, ICC, LCIA, VIAC, which formerly focused mainly on international arbitration, have promulgated rules and procedures for conducting mediation proceedings.<sup>29</sup> Some institutional rules even combine arbitration and mediation.<sup>30</sup> Further several states and the European Union have started deliberations on national and international laws dealing with certain issues of mediation.<sup>31</sup> Mediation has received new impetus from the Mediation Directive<sup>32</sup>, which is a significant landmark. The Mediation Directive will lead to

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<sup>27</sup> Coming from a common law tradition, it may be argued that due to considerations of impartiality, arbitrators should rather not suggest a specific formula for settlement. See Fischer-Zernin/Junker, *Arbitration and Mediation: Synthesis or Antithesis?* in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 24 et seq. and p. 35 et seq.

<sup>28</sup> Fischer-Zernin/Junker, *Arbitration and Mediation: Synthesis or Antithesis?* in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 27 et seq.

<sup>29</sup> Fischer-Zernin/Junker, *Arbitration and Mediation: Synthesis or Antithesis?* in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 27 et seq. For further discussion on the mediation rules of UNCITRAL and the ICC see section 4 below.

<sup>30</sup> See for example DIS Mediation/Conciliation Rules, available at <http://www.dis-arb.de>. See also art. 12 Stockholm Chamber of Commerce Mediation Institute's Rules, available at [http://www.sccinstitute.com/uk/SCC\\_Mediation\\_Institute/Rules/](http://www.sccinstitute.com/uk/SCC_Mediation_Institute/Rules/). See further art. 30 (1) UNCITRAL Model Law on Commercial Arbitration, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

<sup>31</sup> For a brief description of the laws on mediation in Austria, Germany, France, England, Scotland, Wales, Denmark, Sweden, Norway, Finland, Bosnia-Herzegovina, Bulgaria, Croatia, Poland and Slovakia see Filler, *Recht der Mediation im europäischen Vergleich in Kleindienst-Passweg/Wiedermann/Proksch, Handbuch Mediation* (2008) register 13, sec. 3.

<sup>32</sup> Mediation Directive, *supra* note 8.

a proliferation of mediation in commercial matters throughout the now 25<sup>33</sup> members of the European Union. Furthermore, issues of mediation are often included on the agenda of conferences on arbitration. Many publications focusing on arbitration include comments on mediation. Some law firms now have "Dispute Resolution" departments, offering mediation as alternative to arbitration and litigation.

However, there is still a general lack of awareness to overcome. But what can help this to change? Further mandatory educational training at universities, professional discussion among chambers of commerce and bar associations, promotion in the general media, in business and law magazines and newspapers may further contribute to a better understanding between mediation and adversarial techniques of business dispute settlement.

## 2.2 The main differences between mediation, arbitration and litigation

Mediation differs in several aspects from litigation and arbitration. Special attention must be paid to the selection process and the competencies of the neutral third party, the judge, arbitrator or mediator and issues of the process, including voluntariness. In addition, there are main differences in the enforcement process of the outcomes of mediation arbitration and litigation.

### 2.2.1 Litigation

Parties in dispute most frequently employ litigation as method of dispute settlement. An independent third party, the judge, who officially represents the state, resolves the dispute. The origins of litigation are based in law. Adversarial proceedings are based upon a formal code of procedure and result into an enforceable judgement. Parties may refer to a system of appeals arguing procedural deficiencies or presenting complaints on the merits.

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<sup>33</sup> Denmark does not take part in the adoption of the Mediation Directive and is not bound by it or subject to its application. See sec. 30 Preamble Mediation Directive.

### 2.2.2 Arbitration

Arbitration has its origin in contract law.<sup>34</sup> An arbitral tribunal has jurisdiction over disputes that are covered by an arbitration agreement. An arbitration agreement must fulfil certain minimum content requirements in order to be valid and binding upon the parties.<sup>35</sup> Where a valid arbitration agreement exists, arbitration takes place even if a party fails to appear. Unilateral termination by one party is impossible. Arbitral tribunals have strong procedural powers. Not only that they decide with final authority on issues of procedure, fact and law, arbitral tribunals' procedural powers include amongst others (i) to decide on its own jurisdiction, (ii) to order security for claims and for costs and (iii) to render interim and conservatory measures. Arbitral tribunals have the power to render arbitral awards, which are enforceable under most jurisdictions and international conventions as well as bilateral treaties.

### 2.2.3 Mediation

Mediation is an entirely consensual process, based upon the principle of voluntariness. In general, there must be agreement to mediate, and agreement to continue to mediate once the process has begun. Parties will either have agreed to mediation in their contract, or they may agree to attempt a mediated settlement once a dispute has arisen. However, contrary to an arbitration agreement, a simple mediation agreement does not oblige the parties to refer a dispute to mediation. As it cannot be enforced it is simply a declaration of intent.<sup>36</sup> Where the parties have agreed to mediate, they are free to select the mediator. In most jurisdictions, mediators do not need special training or

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<sup>34</sup> Lionnet, Arbitration and Mediation – Alternatives or Opposites? in *Journal of International Arbitration*, Vol. 4 No. 1 (1987) p. 70; Fischer-Zernin/Junker, Arbitration and Mediation: Synthesis or Antithesis? in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 24.

<sup>35</sup> According to section 581 (1) Civil Procedure Code (Zivilprozessordnung, ZPO) RGBI. Nr. 113/1895 last amendement BGBl. I Nr. 128/2004, the mandatory requirements for an arbitration agreement are an exact determination of the parties to the agreement and of the subject matter, as well as a submission to the jurisdiction of the arbitral tribunal.

<sup>36</sup> Fischer-Zernin/Junker, Arbitration and Mediation: Synthesis or Antithesis? in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 27 et seq.



qualifications.<sup>37</sup> Mediation institutions may assist finding a qualified and specialized mediator. All mediators must declare and maintain their independence and impartiality of the parties in dispute. The conduct of the mediation is in the hands of the parties and the mediator. The parties may agree upon application of institutional rules or negotiate the rules for mediation on an ad hoc basis. Mediation meetings for example may have the form of a combination of joint sessions, with all parties and the mediator, and separate sessions, or caucuses, in which each side meets for private and confidential discussions with the mediator.<sup>38</sup> Mediation settlement agreements – in general – are private law contracts, which are not enforceable per se.<sup>39</sup>

Empirical studies on the number, success and durability of international mediation proceedings are rare.<sup>40</sup> The reasons why empirical data are hardly available lie mainly in the confidential nature of mediation proceedings. In addition, there is no international mediation organization, which has interest in observing a large number of mediation proceedings. However, there exists considerable literature on mediation and other methods of alternative dispute resolution techniques supporting that ADR techniques provide advantages compared to litigation (and sometimes arbitration) and are effective in

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<sup>37</sup> Some mediation institutions request mediators to have attended certain training in mediation (e.g. CEDR).

<sup>38</sup> The parties' right to be heard and to be treated equally prevents arbitrators to meet with the parties separately during the course of arbitration proceedings.

<sup>39</sup> At the ICCA conference in 1982 it was discussed to extend the scope of the New York Convention on the recognition and enforcement of foreign arbitral awards to include mediation settlement agreements. Based upon the argument that mediation settlement agreements should not be stronger than any other party agreements, the thought was not further discussed. See Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 471 with further references.

<sup>40</sup> The same applies for arbitration proceedings. See Bühring-Uhle/Scherer/Kirchhoff, *The Arbitrator as Mediator in Journal of International Arbitration*, Vol. 20 No. 1 (2003) p. 81.

practice.<sup>41</sup> Though not necessarily the first choice in all circumstances, mediation is a popular method for resolving disputes. There are many cases, where mediation offers advantages over litigation or arbitration and other forms of dispute resolution. Where the dispute cannot be settled through negotiations due to (i) poor communication, (ii) failure to express emotions, (iii) different view of facts or legal outcomes, (iv) conflict as an issue of principle or (v) involvement of multiple parties or issues, mediation may help to overcome these impediments to settlement.<sup>42</sup> Parties are commonly attracted to mediation proceedings, as they know that they remain capable of settling the dispute according to their needs without shifting responsibility for decision taking to a third party.<sup>43</sup> Mediation particularly offers options for the parties to structure and frame their future business relationship.<sup>44</sup> In the preamble of the UNCITRAL Model Law the General Assembly considered that the use of amicable dispute settlement methods “results in significant benefits, such as reducing the

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<sup>41</sup> Hill, The theoretical basis of mediation and other forms of ADR: Why they work in *Arbitration International*, Vol. 14 No. 2 (1998) p. 173 et seq.; Hill, Non-adversarial mediation in *Journal of International Arbitration*, Vol. 12 No. 4 (1995) p. 135 et seq.; Wälde, Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation in *Arbitration International*, Vol. 22 No. 2 (2006) p. 205 et seq.; Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 3.02; Clift, *Mediation: FAQ's* (2007) gives a brief insight into mediation. It is published online in several languages at [www.linexlegal.com](http://www.linexlegal.com).

<sup>42</sup> Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 3.04. See also Fisher/Ury, *Getting to Yes*<sup>2</sup> (1991).

<sup>43</sup> Lionnet does not see any benefit in mediation and argues, that “if agreement is not possible ... parties ... will no longer be prepared to ask a mediator for advice that is based on guesswork.” Referring to a Swedish lawyer he even states that “all mediation proceedings make the astonishing assumption that the parties are incapable of sorting out their affairs themselves or that they are represented by incapable advisers.” See Lionnet, Arbitration and Mediation – Alternatives or Opposites? in *Journal of International Arbitration*, Vol. 4 No. 1 (1987) p. 73. See also Fischer-Zernin/Junker, Arbitration and Mediation: Synthesis or Antithesis? in *Journal of International Arbitration*, Vol. 5 No. 1 (1988) p. 39.

<sup>44</sup> Berger, Integration of Mediation Elements into Arbitration – ‘Hybrid’ Procedures or ‘Intuitive’ Mediation by International Arbitrators in *Arbitration International*, Vol. 19 No. 3 (2003) p. 391.

instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.”<sup>45</sup> Mediation may be particularly suitable where the parties in dispute hope to preserve, or to renew their commercial relationships and benefit by continuing to do business together after the dispute is resolved.<sup>46</sup> Mediation may further be eminently sensible if a party wants to maintain its reputation as a good business partner.

## 2.3 Drafting the mediation agreement

### 2.3.1 Timing

As mediation is a voluntary, consensual process, a critical first step is to create a mediation agreement.<sup>47</sup> A mediation agreement may be contained in a contract or may be entered into once a dispute has arisen.<sup>48</sup> Including a mediation agreement into a contract is usually much easier during the negotiation phase of a contract. At this point in time, parties are cooperative and they consider the chance that a dispute will emerge a remote possibility. Regardless of all good intentions and the thoroughness of a contract, something may go wrong and demand for dispute settlement. Dispute settlement clauses shall therefore be considered early in contract negotiations. Inclusion of a mediation agreement into the parties' contracts is therefore highly recommended and will increase the likelihood of settling a dispute before the

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<sup>45</sup> UNCITRAL Model Law on International Commercial Conciliation, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html).

<sup>46</sup> Hill, Non-adversarial mediation in *Journal of International Arbitration*, Vol. 12 No. 4 (1995) p. 136 et seq.

<sup>47</sup> The contract with the mediator must be differentiated from the mediation agreement, the contract between the parties. In practice, both contracts are contained in one document. See Eidenmüller, *Vertrags- und Verfahrensrecht der Wirtschaftsmediation Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle* (2001) p. 8 et seq.

<sup>48</sup> Shane/Hassan, *Initiating an International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.03.

parties resort to state court proceedings or arbitration. Convening mediation in the absence of an appropriate pre-existing contractual clause can require some time.

Mediation may not only be used before the beginning of court or arbitration proceedings. In many situations, mediation may be resorted to during the course of litigation or arbitration, at all times before the judgement or the award is rendered.<sup>49</sup>

### 2.3.2 Professional assistance

Mediation clauses shall be drafted carefully. Expert advice on drafting dispute settlement clauses may avoid time consuming and costly delays in the dispute settlement procedure. Many mediation institutions recommend model mediation (or arbitration) clauses, which are available on their websites.<sup>50</sup> Such model clauses should be seen as a starting point and should not be used without having regarded the potential value of the dispute, the type of contract, the parties' legal nature and nationality and the respective institution's mediation rules. Dispute settlement clauses should be adapted for every contract and not *just copied from one document to the other*. It is imperative to evaluate the rest of the agreement and consider whether there exist any inconsistent or alternative dispute settlement provisions. It is recommended to take specialist advice.

### 2.3.3 Scope

Parties should consider the intended scope of the mediation agreement. The mediation agreement may cover any dispute, controversy or claim arising out of or in connection with the contract or may only be applied under specific circumstances. It may cover all aspects of the conflict or be initiated only with regard to specific disputes on the merits or even with regard procedural issues. In

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<sup>49</sup> Hill, Non-adversarial mediation in *Journal of International Arbitration*, Vol. 12 No. 4 (1995) p. 136.

<sup>50</sup> See section 6.4 below.

addition, mediation agreements may be optional or obligatory – meaning that adversarial proceedings shall only be initiated after mediation failed.<sup>51</sup>

Dispute settlement clauses may be drafted as multi-step clauses, starting with negotiations, continuing with mediation and ending with arbitration or litigation. They should include a means for final dispute settlement if mediation is unsuccessful. The reasons therefore are obvious: There may be cases, where mediation fails or may not even be initiated. As mediation is a voluntary process, parties may simply decide not to participate in mediation as they consider the mediation process inappropriate for the resolution of a specific dispute. In addition there are a percentage of cases in which mediation is unsuccessful and terminates without a mediation settlement agreement. As the mediator has no competence to render a binding decision there may further be situations, where the parties must look for an alternative dispute settlement method leading to a final and binding decision. Consequently, it is recommended that parties provide for an alternate procedure in order to ensure as efficient as possible a final resolution in the event that mediation does not produce the desired outcome. Parties may agree upon recourse to arbitration or to litigation, respectively, if mediation does not succeed. However, combining several procedures requires great care.

#### 2.3.4 Legal nature

The mediation agreement contains substantive and procedural agreements.<sup>52</sup> Shane/Hassan describe the effect of a mediation agreement in the following way: "The effect of such a clause is to create a binding provision to enter into non-binding negotiations."<sup>53</sup> Indeed, the provision has value, because once

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<sup>51</sup> See also sections 2.3.4 on the legal nature of mediation agreements and 2.5.1 on voluntariness below.

<sup>52</sup> Eidenmüller, Vertrags- und Verfahrensrecht der Wirtschaftsmediation Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle (2001) p. 9 et seq.; For the legal nature of the mediation agreement see Heß/Sharma, Rechtsgrundlagen der Mediation in Haft/Schlieffen (ed.) Handbuch Mediation (2002) § 26 mn 16 et seq.

<sup>53</sup> Shane/Hassan, Initiating an International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 2.03.

mediation commences, the parties become volunteers in the mediation process, since they are free to leave whenever they see fit to do so.<sup>54</sup> The most effective tool to enforce a mediation clause is to make mediation proceedings a condition precedent to the submission of disputes to litigation or arbitration.<sup>55</sup> Parties and their counsel must evaluate whether and how a mediation clause is enforceable under the law applicable to the contract. However, enforceability of a mediation agreement has not yet been tested in court in several jurisdictions, including Austria.<sup>56</sup>

### 2.3.5 Governing law

If it is not dealt with under another provision of the contract, the dispute settlement clause should include a provision regarding the governing law. Both, substantial and procedural law are of interest. As mediation settlement agreements should be negotiated “in the shadow of the law”, at least mandatory laws, public policy and bonos mores must be considered. Otherwise, enforcement of mediation settlement agreements cannot be guaranteed. Consequently, parties should pay some attention on the question which substantive law shall be applicable to their dispute. This is also of relevance in multi-step dispute settlement agreements. Where mediation fails, parties may want to choose which national laws state courts or arbitral tribunals must observe.

Some jurisdictions contain certain regulations dealing with issues relating to mediation procedure. Indeed, these rules are in general worth to be applied. Where such rules exist on a statutory level, they generally regulate confidentiality of the mediation process and suspension of any relevant statute of limitations. Where the parties do not refer to any procedural law, the *lex fori*

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<sup>54</sup> Shane/Hassan, *Initiating an International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.03.

<sup>55</sup> Shane/Hassan, *Initiating an International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.03.

<sup>56</sup> For further information see section 2.5.1 below.

applies.<sup>57</sup> This means that the procedural laws of the country where the proceedings take place apply. The parties should keep this in mind when deciding on the place of mediation and the applicable law.

## 2.4 Persons in mediation

### 2.4.1 Party representatives

In commercial mediation the parties are free to authorize a representative for the mediation proceeding.<sup>58</sup> Representation must not necessarily be undertaken through a lawyer or a notary. Any representative (e.g. administrator, chief executive, authorized officer) can be chosen.

Attention must be paid upon the choice of the party representative in mediation proceedings. Each party to mediation shall have a representative or lead negotiator who has knowledge of the case and is furnished with full authority to settle the dispute. The representative of each party must have the requisite authority to settle the dispute on behalf of that party. The representative must also have instructions as to the financial limit of his or her authority. The person must have the time and will to participate in mediation proceedings, should project integrity and respectability, ought to be able to control emotions and should be perceived as a good witness.<sup>59</sup> Where the representative lacks broad settlement authority, the party shall notify the mediator, the institution and the other parties of any limitation. This may include for instance lack of legal capacity, the need for board decision, ministerial approval, and third party involvement. Non- or late disclosure of limited authority to settle can call into question that party's good faith involvement in the mediation process, and may have detrimental effects on the prospects of success of any mediation.

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<sup>57</sup> On further comments on *lex fori* see Bühring-Uhle/Scherer/Kirchhoff, *Arbitration and Mediation in International Business*<sup>2</sup> (2006) p. 229 and 236.

<sup>58</sup> In mediation proceedings regarding family matters the parties generally attend the mediation procedure in person.

<sup>59</sup> See Abramson, *Representing Clients in Mediation* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 3.04.

Traditionally, one or more party representatives and counsel attend mediation sessions.<sup>60</sup> While direct involvement of the parties substantially increases the likelihood for success of the mediation process, attorneys may not appear where the nature of factual and legal issues and the bargaining power of the party representative allow so.<sup>61</sup>

#### 2.4.2 Attorneys

In general attorneys are welcome to participate as representatives or as advisers in mediation. They may even act as mediators themselves. However, while mediation is very popular in certain countries, most notably in the United States of America and in the Far East, it is less popular elsewhere, including several industries in Europe.<sup>62</sup> The reasons therefore lie also in attorneys' lacking familiarity with mediation techniques and process, absent routine for representing clients in mediation proceedings and their general unwillingness to learn more about the mediation process and its benefits.<sup>63</sup> The majority of the legal profession are still reluctant to use mediation.<sup>64</sup> Many of them prefer to use

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<sup>60</sup> Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 3.04.

<sup>61</sup> Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 3.04.

<sup>62</sup> Carins, Mediating International Commercial Disputes: Differences in U.S. and European Approaches in *Dispute Resolution Journal*, 1 August 2005, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200508/ai\\_n15704693](http://findarticles.com/p/articles/mi_qa3923/is_200508/ai_n15704693); Hill, Non-adversarial mediation in *Journal of International Arbitration*, Vol. 12 No. 4 (1995) p. 137. See also Kaufmann-Kohler/Kun, Integrating Mediation into Arbitration: Why it works in China in *Journal of International Arbitration*, Vol. 25 No. 4 (2008) p. 483 et seq.

<sup>63</sup> Hill, Non-adversarial mediation in *Journal of International Arbitration*, Vol. 12 No. 4 (1995) p. 137; Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 3.01.

<sup>64</sup> Questions as the following may go through attorneys' minds: How do you propose mediation to your client and opposing counsel without appearing weak? How can they find the right mediator for the respective case? What are the attorney's tasks before, during and after mediation? And how could unbridgeable gaps between the parties' positions be closed?



the traditional methods and carry out lawsuits before the commercial courts. There still remain attorneys who are not trained in negotiation skills or dispute resolution at university. Many attorneys went to law school before courses on dispute resolution were offered or fear to lose business through mediation.<sup>65</sup> This must however not always be true. Mediation offers several fields of practice for attorneys. They may perform various functions when representing clients in mediation or even work as mediators themselves.<sup>66</sup> Admittedly, where

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<sup>65</sup> Nelle concludes that lawyers' self interest in an adversarial legal process may be a barrier to mediation proceedings. He states that the flipside of mediation's potential for reducing legal cost is a threat to lawyers' revenues. See Nelle, *Making Mediation Mandatory: A Proposed Framework* in *Ohio State Journal on Dispute Resolution* 1992, p. 287 et seq. Lenz notes that lawyers are reluctant to accept mediation proceedings as they consider mediation to be too unforeseeable. In addition they feel to be restricted within their competencies through the mediator. Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 179 et seq. Ponschab states that there is a lack of mediation training and proposes to establish conciliation centers operated by attorneys. Ponschab, *Mediation in der anwaltlichen Tätigkeit* in Breidenbach/Henssler (ed.) *Mediation für Juristen – Konfliktbehandlung ohne gerichtliche Entscheidung* (1997) p. 100 et seq.

<sup>66</sup> For the tasks of the attorney acting as mediator see Friedrichsmeier, *Der Rechtsanwalt als Mediator* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 21 mn 33 et seq. For the attorney's tasks in representing or advising clients during mediation proceedings see Bernhardt/Winograd, *Zusammenarbeit zwischen Rechtsanwälten und Psychologen* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 23 mn 103 et seq.; Abramson, *Representing Clients in Mediation* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II; Edelstein, *Mediation in Commercial Disputes* (2007) available at <http://www.cohenandwolf.com/CM/CommercialLitigationPublications/Mediationcommercialdisputes.asp>; Steinacher, *Der Rechtsanwalt als Berater „seiner“ Partei im Mediationsprozess* in Kleindienst-Passweg/Wiedermann/Proksch (ed.) *Handbuch Mediation* (2008) register 6, secs. 1.2 and 1.4; Brown/Marriott, *ADR Principles and Practice*<sup>2</sup> (1999), chapter 19; Mähler/Mähler, *Mediation – eine interessengerechte Konfliktregelung* in Breidenbach/Henssler (ed.) *Mediation für Juristen – Konfliktbehandlung ohne gerichtliche Entscheidung* (1997) p. 15 et seq.; Scott/Wilson, *Questions Clients Have about Whether (and How) to Mediate and How Counsel Should Answer Them* in *Dispute Resolution Journal*, 1 May 2008, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_/ai\\_n27899427](http://findarticles.com/p/articles/mi_qa3923/is_/ai_n27899427). For further useful practitioner hints see Abramson, *International Mediation Basics* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 1. For comments on the legal situation in Germany see Henssler, *Anwaltliches Berufsrecht und*

attorneys work as mediators, they cannot represent any of the participating parties in subsequent adversarial proceedings relating to the subject matter of the mediation proceedings.

While attorneys may differ in the amount of enthusiasm they have for mediation generally, all practitioners of commercial dispute resolution must not only be able to advise their clients about mediation, they must also know how mediation works and be able to participate in mediation on behalf of their clients. Distinguished attorneys should – at the time of contracting or where a dispute emerges – in any case advise their clients about all settlement options, including mediation.<sup>67</sup> Several states' professional rules, especially in the United States of America, require attorneys to advise their clients about ADR.<sup>68</sup> Failure to timely advise clients may lead to liability for malpractice. Austrian law does not provide for an obligation to advise clients about mediation. It however declares that attorneys should contribute to settle disputes out of court.<sup>69</sup> According to the Mediation Directive<sup>70</sup>, Member States should encourage legal practitioners to inform their clients of the possibility of mediation.<sup>71</sup>

Where a client opts for mediation attorneys' tasks include to (i) negotiate a mediation agreement with the other parties to the dispute, (ii) prepare the case for brief submissions and the mediation sessions, (iii) assist or represent their client in mediation sessions, (vi) generally advise their clients during mediation

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Mediation in Breidenbach/Henssler (ed.) *Mediation für Juristen – Konfliktbehandlung ohne gerichtliche Entscheidung* (1997) p. 75 et seq.; Ponschab, *Mediation in der anwaltlichen Tätigkeit* in Breidenbach/Henssler (ed.) *Mediation für Juristen – Konfliktbehandlung ohne gerichtliche Entscheidung* (1997) p. 93 et seq.

<sup>67</sup> According to the decision of the English Court of Appeals, lawyers should routinely consider with clients whether their disputes are suitable for ADR (*Halsey v Milton Keynes General NHS Trust*). See also section 2.5.1 on voluntariness below.

<sup>68</sup> Abramson, *Representing Clients in Mediation* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 3.02.

<sup>69</sup> See Preliminary Remarks, Code of Practice for Attorneys.

<sup>70</sup> Mediation Directive, *supra* note 8.

<sup>71</sup> See Mediation Directive, *supra* note 8.

and (v) draft the mediation settlement agreement.<sup>72</sup> Moreover, attorneys' mandate may even include issues coming up after the mediation settlement agreement has been signed. Post mediation tasks may include attorneys' assistance in the implementation of the terms of the mediation settlement agreement. Where mediation ends without settlement agreement, attorneys may assess the legal case and prepare the substantial and legal issues for trial.

Where attorneys actively participate in mediation sessions they should previously consult with the client in order to make sure that there is a common understanding on the responsibilities during the mediation sessions. Attorneys may either have a dominant role and lead the negotiations or remain silent until they consider intervention for their clients' benefit necessary. As per an alternative, attorneys may act as co-participant with the party representative, sharing responsibilities, which frequently happens in business disputes in the United States.<sup>73</sup> Attorneys should set a respectful and empathic tone in mediation, enabling a positive and productive atmosphere for settlement discussions. They are expected to slip into a conciliatory role rather than a more adversarial role often observed in litigation.<sup>74</sup> In addition it must be considered that negotiation techniques generally are not part of the professional training for attorneys. Attorneys investing time and money to educate themselves in mediation may of course use mediation techniques for

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<sup>72</sup> See also Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 3. With regard to the role of attorneys during the drafting of the settlement agreement see Ripke, *Recht und Gerechtigkeit in der Mediation* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 5 mn 45 et seq.

<sup>73</sup> Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 3.

<sup>74</sup> Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 3.05. See also Abramson, *Mediation Representation: Advocating in a Problem-Solving Process* (2004) chapter 7; Friedrichsmeier, *Der Rechtsanwalt als Mediator* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 21 mn 11 et seq.

every negotiation, discussions with colleagues, client conversations or court proceedings.

While on the one hand mediation has not yet found its way in most attorneys' offices, economists, psychologists, sociologists, corporate consultants, chartered accountants and tax advisers take over dispute settlement competencies in business disputes.<sup>75</sup> As the tendency in the society departs from the classical legal methods, lawyers must follow this trend; otherwise they will lose their prominence in dispute settlement.<sup>76</sup>

#### 2.4.3 Mediators

In many jurisdictions anyone can call himself a mediator. What makes a mediator is a business card, a website, a doorplate, an office and a mediation market. But how can interested parties get information on qualified mediators? During the CPR European Congress in May 2008 in Vienna, a mediation user saw the current problem for parties seeking settlement of their disputes through mediation in the fact that there exist no universal rules by which to gauge mediator's competence.<sup>77</sup> Often, there is no professional testing required, no professional body administering mediation proceedings, no disciplinary processes for failures in the mediation proceedings, no transparent feedback process and no objective global resource base to locate mediators.<sup>78</sup>

Indeed, the parties seeking mediation as means for dispute settlement should pay considerable attention to the selection process of the mediator. The success or failure of the mediation process often depends on the skills, and the parties'

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<sup>75</sup> Steinacher, *Anwaltliches Berufsbild und Mediation in AnwBl* 2003, 129 et seq.

<sup>76</sup> Steinacher, *Anwaltliches Berufsbild und Mediation in AnwBl* 2003, 129 et seq.; Trossen, *Integrierte Mediation in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 18 mn 51. See also Breidenbach, *Mediation: Struktur, Chancen und Risiken von Vermittlung im Konflikt* (1995) p. 299 et seq.

<sup>77</sup> Krumberg, *Competency Standards for Mediators*, Northrop Grumman Presentation for the CPR European Congress, Vienna, May 2008.

<sup>78</sup> Krumberg, *Competency Standards for Mediators*, Northrop Grumman Presentation for the CPR European Congress, Vienna, May 2008.

trust, in the mediator.<sup>79</sup> Parties shall specify the method of selection, number, experience, credentials and qualifications of mediators in their mediation agreement. Basically, a mediator should have substantial training in the sophisticated techniques of mediation and the mediation process as well as experience in mediating. Another attribute may be the mediator's knowledge of the subject matter of the dispute. Restrictive criteria for the qualifications of the mediator may make it impossible to appoint suitable mediators. Parties must further decide between appointing a sole mediator or co-mediators or even a panel of mediators. Employing more mediators may particularly be worth in complex multi-party cases, involving cross border issues. When deciding about the number of mediators to be appointed, parties shall bear in mind that the more mediators will be appointed, the more cost will emerge. A solution to possibly reduce the cost of mediation is to reduce the number of mediators and the scale of the fees and administrative charges. If a mediation agreement contains the name of a mediator or appointment criteria there should be a default mechanism. Otherwise there is no procedure to be followed if the mediator is unable or unwilling to take the mandate.

When selecting the mediator, parties may want to resort to the assistance of an institution or appoint a mediator from a list maintained by a reputable mediation provider. Mediation institutions may help objectively selecting the right mediator for a dispute. Various international mediation institutions maintain lists for mediators. Parties may select their mediator from such panel or appoint an independent mediator by reputation.<sup>80</sup> While in mature mediation marketplaces, especially the United States of America and Hong Kong, mediators are selected directly by the parties, institutions suggest or appoint mediators where

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<sup>79</sup> Shane/Hassan, *Initiating and International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.01.

<sup>80</sup> Shane/Hassan, *Tips on Developing an International Mediation Practice in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 4.02.

mediation is less known.<sup>81</sup> Where the parties agree to apply institutional rules they should think about the competencies the mediator should have. The main difference in the institutional rules is the question whether the mediator's competence extends to forwarding informal settlement recommendations to the parties.<sup>82</sup>

Parallel to the question who the mediator should be, parties should considerably deal with the question of the role of the mediator in any other dispute resolution proceedings relating to the mediation. This issue has, especially based upon the differences between arbitration and mediation, generated much discussion.<sup>83</sup> Should a person be able to act as mediator and arbitrator during one and the same dispute settlement process? If yes, parties must – apart from the ideological discussion whether the role of the mediator and the arbitrator may be combined in one person – consider several issues, specifically relating to enforcement of the mediation settlement agreement or arbitral award.<sup>84</sup>

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<sup>81</sup> Shane/Hassan, *Tips on Developing an International Mediation Practice* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 4.03.

<sup>82</sup> See also Schiffer, *Wirtschaftsschiedsgerichtsbarkeit: Die erfolgreiche außergerichtliche Streitlösung* (1999) p. 30.

<sup>83</sup> Baker/Ali, *A cross-comparison of institutional mediation rules* in *Dispute Resolution Journal* (2002), available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_/ai\\_n9060837](http://findarticles.com/p/articles/mi_qa3923/is_/ai_n9060837).

<sup>84</sup> See section 3.7.3.3 on enforcement of mediation settlement agreements contained in arbitral awards below.

Basically, statutory and institutional rules<sup>85</sup> follow the approach that mediators may not act in any parallel or subsequent proceedings relating to the subject matter of the mediation, whether as a judge, arbitrator, expert, witness or representative or advisor of a party. The other way round, a person cannot act as mediator if he previously served in any judicial, arbitral, or similar proceedings relating to the dispute subject to mediation as judge, arbitrator, expert, witness, representative or advisor of a party.

#### 2.4.4 Third parties

Where appropriate, third parties, including technical or legal experts or advisors may be invited to assist in mediation proceedings. As the mediation agreement or statutory provisions on confidentiality do not cover third parties and experts it should be made sure, that a duty to confidentiality extends to such third parties as well.

Statutory provisions generally do not deal with participation of third parties or experts in mediation. There may be cases, where a party is interested in the mediation procedure or where parties or the mediator feel the need for appointing a technical expert who assists in establishing the facts of the case. As mediation is a voluntary process, it may be argued that a person who is not a party to the mediation agreement may only intervene, if all parties and the mediator agree. This would lead to the result that, if a third party wishes to participate in the mediation and at least one of the parties or the mediator objects, mediation proceedings come to an end. Consequently, neither party nor the mediator has the discretion to admit or not to admit a third party. On the other hand it must be considered that the mediator generally has the

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<sup>85</sup> Some institutional rules make it subject to the parties' agreement whether to allow acting one person in the role as arbitrator and mediator. The Stockholm Chamber of Commerce Mediation Institute's Rules are an example in this regard. Art. 12 of the Stockholm Chamber of Commerce Mediation Institute's Rules explicitly states that upon reaching a settlement agreement the parties may, subject to the approval of the mediator, agree to appoint the mediator as an arbitrator and request him to confirm the mediation settlement agreement in an arbitral award.

competence to decide on matters of procedure, where the parties fail to agree. In such case the mediator could simply allow a third party. It may be expected that parties balance the implications of ending mediation with the consequences of accepting the mediator's procedural decision. As the appointment of the expert will generally cause cost, the mediator cannot appoint an expert without the parties' prior consent. Where the parties agree to involve an expert, the wording of the questions to the expert should be based upon the mediator's and the parties' determination. Unless otherwise agreed by the parties, each party has the right to produce reports of private experts who may also be asked to participate in mediation.

#### 2.4.5 Multy-party mediation proceedings

While statutory provisions or institutional rules on arbitration often deal with multy-party proceedings, there is little guidance for mediation proceedings. It is a matter of fact that the more parties exist, the harder is it to find agreement on procedural or substantive issues. Consequently, multy-party mediation must be conducted with diligent care. Problems may start already with the decision on the participants of mediation and appointment of the mediator. It is considered being a difficulty to find general consent on the person of the mediator in multy-party mediation proceedings. If the parties fail to reach agreement on the person of the mediator, mediation cannot be imitated. As per a rather fast alternative to negotiations regarding the person of the mediator, parties may agree on an appointing authority, which nominates the mediator. As per an example Austrian law does not provide for an appointing authority in multy-party mediation proceedings, parties would have to include a respective provision in their mediation agreement. Of course they may agree on an appointing authority ad hoc once the dispute has arisen. Furthermore, multy-party mediation requires the voluntary participation of all involved parties. It may request some effort to establish which parties or which party representatives should be invited to mediation and whose participation is essential for settlement of the dispute.



## 2.5 Principles of the mediation procedure

### 2.5.1 Voluntariness

Mediation is generally described as a nonbinding process, where the parties and the mediator may at any time walk away without bearing any consequences. It is often stated that participation in mediation must be voluntary at the beginning, during and at the end of the mediation proceedings.<sup>86</sup> A duty to mediate is often seen in conflict with the basic principle of voluntariness of the mediation process. However, in some jurisdictions, mandatory mediation is recognized by statutory provisions, applies in practice through court rulings or may be "party made" through a contractual agreement.<sup>87</sup>

While mandatory mediation and the practice of the multidoor-courthouse is well known in the United States of America<sup>88</sup> the practice in Europe is just emerging. As per an example for making mediation attempts somewhat mandatory, some court decisions and statutory provisions from England and France shall be briefly mentioned here. Judges in England may send parties to mediation where they consider mediation proceedings appropriate.<sup>89</sup> On 11 May 2004 the

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<sup>86</sup> E.g. Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 467; Stempel, *Rechtspolitische Aspekte der Mediation in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 4 mn 97.

<sup>87</sup> Nelle as a first step analyzes which controversies are suitable for mediation and as a second step considers whether it is appropriate to mandate mediation of such controversies. Nelle, *Making Mediation Mandatory: A Proposed Framework in Ohio State Journal on Dispute Resolution* 1992, p. 287 et seq.

<sup>88</sup> See Gottwald, *Gerichtsnahe Mediation in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 17 mn 8 et seq.

<sup>89</sup> Rule 54.3 (4) English Civil Procedure Rules. Recently CEDR conducted a survey on the mediation marketplace and attitudes toward mediation in the UK. 227 mediators and 124 lawyers responded to the Internet questionnaire. The survey results indicate that court-connected mediation and employer mediation programs are having an impact on the mediation marketplace, making up about 25% of the total market. At the same time, the survey showed an increase in the use of ad hoc mediation, up to 60% from 55% in 2005 and 45% in 2003. The

English Court of Appeal published its decision in the cases of *Halsey v Milton Keynes General NHS Trust* and *Steel v JOY and HILLIDAY*.<sup>90</sup> The judgment in these cases established two important principles: (i) Compulsion to use ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6 of the European Convention on Human Rights and (ii) cost penalties can be imposed by the courts on parties that have *unreasonably refused to consider some form of ADR*. The second principle was first voiced in the *Dunnett v Railtrack plc* case in February 2002.<sup>91</sup>

The French Supreme Court stated in its decision dated 13 February 2004 that legal proceedings initiated by a party without implementing a first mediation step contained in a mediation agreement are no longer admissible.<sup>92</sup> Accordingly, a mediation agreement obliges the parties to attempt to solve their dispute through mediation before initiating legal proceedings. With such a mediation clause, mediation is compulsory as a first step to find a settlement to the dispute. Where a party initiates legal proceedings without complying with contractual provisions requiring that the parties submit their disputes to mediation, the judge must dismiss the case.<sup>93</sup> Furthermore, articles 131-1 to 131-15 of the French Civil Procedure Code include rules governing court-ordered mediation. Accordingly, a court can invite the opposing parties to seek a settlement through means of mediation. While the judge appoints the

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survey also indicated that the projected number of mediation cases is between 3,400-3,700 cases per year, up from 33% two years ago. CEDR attributed most of this growth to the increased use of court-connected and employer mediation programs. See Anonymous, *Survey Reveals Attitudes Toward Mediation in the UK* in *Dispute Resolution Journal*, 1 February 2008, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_/ai\\_n25138075](http://findarticles.com/p/articles/mi_qa3923/is_/ai_n25138075).

<sup>90</sup> The judgment is available at <http://www.hmcourts-service.gov.uk>.

<sup>91</sup> The judgment is available at <http://www.hmcourts-service.gov.uk>.

<sup>92</sup> Cour de Cassation – Chambre Mixte, 17 février 2003, arrêt n° 217 P.

<sup>93</sup> See Drouault-Gardrat/Babier, *Mediation in France* (2007) available at [www.linexlegal.com](http://www.linexlegal.com); Jaeger/Watkins, *Commercial Mediation in France* (undated) available at <http://www.cmap.fr/pdf/Intervention%20LJA%20New%20York%2015%20septembre%202006.pdf>.

mediator he has no authority to force the parties to accept mediation.<sup>94</sup> The Polish Law goes even further. It allows state courts to mandate mediation, even where they have not made a prior agreement to mediate.<sup>95</sup>

Where the law does not provide for mandatory mediation, parties may want to include a provision rendering mediation mandatory into their contract. In its original form, mediation is, as stated by Nelle, doubly voluntary: it is entered into voluntarily and it produces a result, which is solely based on the parties' agreement.<sup>96</sup> While the second element – the voluntariness of the mediation settlement agreement – cannot even be restricted<sup>97</sup>, the first element – the beginning (and duration) of mediation proceedings – may be somewhat confined contractually. Compulsion may, depending upon the parties' duty to engage into the mediation process, differ in its intensity. The earlier a party may terminate mediation proceedings - without bearing any consequences - the less is the element of compulsion. The least compulsory interference is to request the parties to appear to a first information session, dedicated to give the participants to mediation an understanding of the mediation process, its duration, cost, benefits and drawbacks. The content of the duty to mediate may – apart from a first information session – encompass the (i) presence at the mediation session, (ii) provision of information, and (iii) – the most intrusive – a

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<sup>94</sup> See Jaeger/Watkins, Commercial Mediation in France (undated) available at <http://www.cmap.fr/pdf/Intervention%20LJA%20New%20York%2015%20septembre%202006.pdf>.

<sup>95</sup> See Pieckowski, How the New Polish Civil Mediation Law Compares with the Proposed EU Directive on Mediation in Dispute Resolution Journal, 1 August 2006, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200608?pnun=7&opg=n16779628](http://findarticles.com/p/articles/mi_qa3923/is_200608?pnun=7&opg=n16779628).

<sup>96</sup> Nelle, Making Mediation Mandatory: A Proposed Framework in Ohio State Journal on Dispute Resolution 1992, p. 287. For general comments on this issue see also Eidenmüller, Ökonomische und spieltheoretische Grundlagen von Verhandlung/Mediation in Breidenbach/Henssler (ed.) Mediation für Juristen – Konfliktbehandlung ohne gerichtliche Entscheidung (1997) p. 53 et seq.

<sup>97</sup> Only where the parties do not enter into the settlement agreement voluntarily, the process cannot be called mediation.

good faith effort to resolve the controversy through mediation.<sup>98</sup> While a duty to mediate may decrease the overall level of adversarial behaviour it may also – on the other hand – have no incentive to resolve the case where a party has no interest in making mediation work. Consequently, before agreeing on compulsory mediation, parties should balance the benefits of mediation against the costs of imposing mediation.<sup>99</sup> In addition, they should clearly define the point in time when a party may terminate mediation proceedings.

Where the parties agree to compulsory mediation, they must also consider how this duty could be enforced.<sup>100</sup> The parties may include a contractual provision imposing the cost of unsuccessful mediation efforts, including the mediator's fees and expenses, institutional fees and the other party's expenditures, on the party that failed to comply. It may however be difficult to prove non-compliance. As per another means, parties may agree to shift all legal cost of subsequent adversarial proceedings to the party that refused to mediate. Less intrusive is to delay or deny access to adversarial forums until a sincere settlement attempt has been made in mediation proceedings. Enforcement of a mediation agreement is however a highly sensible issue. Neither the Mediation Directive nor the Mediation Act deals with the question whether mediation agreements containing an obligation to participate in mediation can be enforced.<sup>101</sup> Basically, it seems to be impossible to oblige somebody to voluntarily participate in a process. It may be hard to determine whether a party put

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<sup>98</sup> Nelle, Making Mediation Mandatory: A Proposed Framework in Ohio State Journal on Dispute Resolution 1992, p. 287 et seq.

<sup>99</sup> Nelle, Making Mediation Mandatory: A Proposed Framework in Ohio State Journal on Dispute Resolution 1992, p. 287 et seq.

<sup>100</sup> For a discussion of potential means for enforcement of a duty to mediate see Nelle, Making Mediation Mandatory: A Proposed Framework in Ohio State Journal on Dispute Resolution 1992, p. 287 et seq.

<sup>101</sup> Belgium seems to have introduced a mechanism for enforcing mediation settlement agreements. The contract providing for mediation is an enforceable contract under the Belgian Civil Code. See Demeyere, The Belgian Law on Mediation: An Early Overview in Dispute Resolution Journal, 1 November 2006, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200611/ai\\_n17194787/pg\\_6](http://findarticles.com/p/articles/mi_qa3923/is_200611/ai_n17194787/pg_6).

enough effort into the success of the mediation process. Furthermore, it is doubtful, what such effort could at all contain. Is it participation only or some further engagement? It has not yet been sufficiently addressed by state courts whether and how mediation agreements may be enforced.<sup>102</sup> Following the consensual approach of mediation, enforcement of mediation agreements seems to be a rather strong tool. Furthermore, it remains doubtful whether a court would decline jurisdiction where one party argues that there exists a mediation agreement.<sup>103</sup> Even though declining jurisdiction due to the existence of an arbitration agreement is frequent statutory practice in arbitration, there should be reluctance to apply the same principle to mediation agreements. Contrary to mediation, arbitral proceedings do end with a final settlement, the arbitral award. Where a party aims at final adversarial settlement it should not be hindered by the existence of a mediation agreement. Nothing is however wrong with obligatory information sessions allowing the parties an informed choice between different dispute settlement options.<sup>104</sup> Neither is there a lot to object to sanctions for non-participation through court orders.<sup>105</sup> This would however come close to indirect, subsequent enforcement and lead to uncertainty. Parties may arrive at the conclusion to better try mediation than taking the risk of getting a cost order in their disfavour.

As stated above, mediation is a voluntary process, which allows all parties and the mediator to end the amicable endeavours at any time. However, the parties may agree upon reasons for termination or an obligatory first information session. As a matter of fact, parties often do not know exactly what mediation is and how it works. Even where the parties have contractually agreed on mediation, the management or the responsible person for settling the dispute may not have been involved in the contract negotiations and may not be

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<sup>102</sup> Bühring-Uhle/Scherer/Kirchhoff, *Arbitration and Mediation in International Business*<sup>2</sup> (2006) p. 230.

<sup>103</sup> Bühring-Uhle/Scherer/Kirchhoff, *Arbitration and Mediation in International Business*<sup>2</sup> (2006) p. 231.

<sup>104</sup> See section 3.2.4 on voluntariness in the Mediation Act and the Mediation Directive below.

<sup>105</sup> See section 3.2.4 on voluntariness in the Mediation Act and the Mediation Directive below.

informed about the basics of the amicable dispute settlement process. This may lead to a precipitant decision to ignore mediation proceedings and directly go for litigation or arbitration. Therefore, in practice mediation agreements should request the parties to attend a first mediation session, mainly having the purpose to inform the parties about the mediation procedure.<sup>106</sup> Apart from the ICC Rules, institutional rules do not generally include such obligatory element. Parties wishing to seriously consider mediation prior adversarial proceedings should therefore make sure that the dispute settlement clause provides for a mandatory informative meeting between the parties to the dispute with the mediator or the mediation institution.

### 2.5.2 Confidentiality

Success of mediation proceedings depends to a great extent on the parties' willingness to disclose information and enter into open negotiations. Parties' may be reluctant to enter into truthful negotiations if they must fear that the other party may use any information obtained during mediation or call the mediator as witness in subsequent state court or arbitration proceedings if mediation proceedings fail. Consequently, parties must pay attention to confidentiality rules between the participants of mediation on the one hand and the rules about the mediator's confidentiality including reports to courts or arbitral tribunals on the other hand. Without an agreement to the contrary, parties may introduce, or rely upon, discussions done under the auspices of the mediation, documents produced in the mediation and anything else arising out of the mediation for the purposes of subsequent arbitration or litigation. A mediator may be called as witness in subsequent adversarial proceedings or may be requested to hand over documents relating to the mediation proceedings. Another aspect of confidentiality may be the mediator acting as an arbitrator in respect of the same dispute in subsequent arbitral proceedings in the same matter. Confidentiality means that no outsider, including competitors,

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<sup>106</sup> Eidenmüller, Vertrags- und Verfahrensrecht der Wirtschaftsmediation: Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle (2001) p. 9.

customers, suppliers, investors or the general public will learn about what happened in mediation.

Of course, the strongest bases for confidentiality are statutory rules. Some states have rules that focus on confidentiality in mediation. Some national laws include for example a provision regarding the mediator's duty to confidentiality or his incapacity to testify in state court proceedings relating to the content of a previously held mediation proceeding.<sup>107</sup> Statutory provisions imposing a duty to confidentiality upon the parties to mediation rarely exist. Where the law does not provide for rules on confidentiality, parties must provide for it explicitly, either by the mediation agreement or via institutional rules. However, although a stipulation of confidentiality in a mediation agreement is a certain guarantee, parties must bear in mind that without statutory support, the agreement is no more than a private contract which is only binding on the signatories.<sup>108</sup> There may be jurisdictions where courts simply order disclosure as a matter of public policy or judicial power.<sup>109</sup> However, confidentiality will usually be broader in mediation than in litigation. Infringement of the duty to confidentiality may be made subject to a contractual penalty.

The duty to confidentiality may however bear a certain danger. A party may introduce any adverse information to mediation proceedings and could then refer to the provision of confidentiality in subsequent state court proceedings. The other party may have difficulties to prove its claim or may face the risk to pay a contractual penalty for infringing the duty to confidentiality. Consequently a provision on confidentiality should be drafted in a way excluding facts, which

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<sup>107</sup> Sec. 18 Mediation Act; sec. 320 Civil Procedure Code; sec. 152 Criminal Procedure Code (Strafprozessordnung, StPO) BGBl. Nr. 631/1975 last amendment BGBl. I Nr. 109/2007.

<sup>108</sup> Abramson, Representing Clients in Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 3.04.

<sup>109</sup> Bühring-Uhle/Scherer/Kirchhoff, Arbitration and Mediation in International Business<sup>2</sup> (2006) p. 235.

could be proved without conducting mediation proceedings.<sup>110</sup> In addition, the content of a mediation settlement agreement and the facts of the case must be exempted from the duty to confidentiality. Otherwise a party could not initiate proceedings to enforce the mediation settlement agreement or file a claim for infringement of the mediation settlement agreement. Furthermore, the content of the mediation agreement itself should not be confidential – at least not with regard to the fact that mediation proceedings were initiated.

In addition, there must be exceptions of the duty to confidentiality for the mediator. Firstly, where public interests request disclosure, the mediator shall be released from the duty to confidentiality. Secondly, where the parties fail to balance the mediator's fees and expenses, the mediator must prove the existence of a claim against the parties to the mediation proceedings.

Based upon the argument to provide greater confidence in the mediator and mediation proceedings most statutory and institutional rules follow the general rule that mediators are excluded from acting as arbitrators or judges in adversarial proceedings on the subject matter of the mediation.<sup>111</sup> Neither may mediators act as legal representative of one of the parties.

## 2.6 Conduct of the mediation proceedings

### 2.6.1 The style of mediation

There are almost as many different styles of mediations as there are mediators. Mediators have undergone certain training, apply specific techniques, have particular skills and different professional backgrounds and of course bring their own personality. As per an example, some mediators follow a caucus model, meaning that the parties may separately discuss with the mediator, while others only meet in joint sessions. While each mediation style can be effective, it may not be what a certain party expects from mediation. Consequently, it is

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<sup>110</sup> Eidenmüller, Vertrags- und Verfahrensrecht der Wirtschaftsmediation: Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle (2001) p. 26.

<sup>111</sup> See also art. 12 UNCITRAL Model Law on Commercial Conciliation.



advisable to agree on a certain mediation procedure and code of conduct. Some institutions have their own codes of conduct; others state that the European Code of Conduct shall be applicable. The purpose of codes of conduct is to provide for a general framework of practice of the mediation proceedings, which may – of course – be affected by national laws or contractual agreements. Codes of conduct not only serve as guide for mediators but also inform interested parties, attorneys and organisations about the mediation process. It must however be considered that as mediation is a flexible process, it is rather impossible to describe all specific “procedures” for its conduct, including techniques, patterns and steps of the mediation.

Mediation proceedings must be prepared diligently. Parties may agree to conduct a pre-mediation conference, between the parties’ attorneys and the mediator, having the purpose to discuss possible obstacles to mediation.<sup>112</sup> Brief submissions accompanied by the most important and critical documents may be exchanged prior the first mediation session. The purpose of the brief submission is to educate the mediator about the case and present him a balanced view of the facts and the law. Parties can develop a negotiation plan<sup>113</sup> and prepare for the mediation session. Inadequate preparation can diminish efficiency, reduce the likelihood for success and prolong the mediation.<sup>114</sup> Audio and visual aids for the purpose of accessing and presenting information shall be used if accessible.

During the first mediation meeting, a mediator may want to consider starting mediation sessions with an opening statement, including a brief introduction on the essentials of the mediation proceedings and comments on the mediator’s qualification, expertise, method of appointment and impartiality. The mediator must disclose all actual or potential conflicts of interests disclaim any bias,

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<sup>112</sup> Abramson, Representing Clients in Mediation in Rhoades/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 3.04.

<sup>113</sup> Abramson, Representing Clients in Mediation in Rhoades/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 3.04.

<sup>114</sup> Abramson, Representing Clients in Mediation in Rhoades/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 3.04.

partiality or circumstances likely to create a perception of bias. The mediator will recognize at the beginning of the mediation proceedings that mediation is based upon the principle of self-determination and will conduct the mediation fairly and diligently. A mediator should refrain from providing professional advice. Where the mediator sees need for professional assistance he should recommend that parties seek consultation with a lawyer.

After the parties and the mediator reach consensus on the formal issues of the mediation process, the mediation proceedings will go into a phase on the merits, including several stages, such as (i) information gathering, (ii) problem identification, (iii) problem solving through generating options and bargaining and (iv) – in the best case – drafting the settlement agreement.<sup>115</sup>

#### 2.6.2 Institutional rules

As with arbitration, mediation may be conducted pursuant to a set of procedural rules developed by an institutional dispute resolution service provider or according to an ad hoc set of rules agreed upon by the parties themselves. When parties decide to use mediation as a dispute settlement technique, one of the first questions to address is whether to use an institution to administer mediation proceedings or whether to opt for ad hoc mediation through the use of an independent mediator without an administrative body supervising and assisting the mediation process.<sup>116</sup> Having considered which type of mediation best suits the parties and the type of dispute, parties should make an informed choice between institutional (ICC, LCIA) and ad hoc mediation proceedings (UNCITRAL). It must be noted that no single mediation institution has a global reach. Most likely the institutions do not only offer mediation but also other means of alternative dispute resolution, mainly arbitration. The institutions are competitors in a highly competitive market and have little incentive to co-

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<sup>115</sup> For a description of the mediation process and negotiation techniques see for example: Moore, *The Mediation Process* (1986); Fisher/Ury, *Getting to Yes*<sup>2</sup> (1991).

<sup>116</sup> Shane/Hassan, *Initiating and International Mediation* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.01; Lachmann, *Handbuch für die Schiedsgerichtspraxis*<sup>2</sup> (2002) mn 37.

operate with each other to create global mediation standards.<sup>117</sup> With the choice of the institution it must further be considered that mediation institutions themselves are often fragmented among many different disciplines and operate according to different local and national standards.<sup>118</sup> Although application of institutional rules entails additional administrative costs, the benefits are obvious: Issues of procedure are regulated previously by a comprehensive set of institutional rules, including regulations on confidentiality, appointment of mediators and cost. Parties do not have to enter into time and cost consuming discussions relating to procedural decisions. Such discussions may further bear potential for additional disputes. The institution will provide administrative assistance through a trained staff and may engage in the process of selecting the mediator.

Institutional mediation proceedings can take place if the parties agree to submit their dispute to the rules of the institution. Such agreement may occur (i) in a prior agreement between parties to submit their disputes to mediation according to specific mediation rules, either in their underlying contract or in a subsequent agreement; or (ii) through a request for ADR submitted by one party and accepted by the other party. Institutional rules may be amended by agreement of the parties.

Institutional rules should be in line with the mediation agreement. If the mediation agreement contains provisions, which are inconsistent with the institutional rules, it should be made clear, that the institutional rules are amended insofar by agreement of the parties.

Several mediation institutions provide model mediation clauses parties may want to consider including in their agreement.<sup>119</sup>

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<sup>117</sup> Krumberg, Competency Standards for Mediators, Northrop Grumman Presentation for the CPR European Congress, Vienna, May 2008.

<sup>118</sup> Krumberg, Competency Standards for Mediators, Northrop Grumman Presentation for the CPR European Congress, Vienna, May 2008.

<sup>119</sup> The model mediation clauses of the institutions discussed in this paper see section 6.4 below.

As institutional rules may be revised or renamed by the institution, after the parties' agreement to refer their dispute to certain institutional rules, it is advisable to include a provision which makes clear, which version of the institutional rules apply. Parties may want to apply the rules in force at the point in time they concluded the contract or the ones effective at the date when the institution receives the request for mediation.

Where the parties agree to appoint an independent mediator without referring to an institution they may still agree on application of an international set of mediation rules, for example the UNCITRAL Rules. While this approach saves cost, as the institution's administrative fee must not be paid, less experienced parties may not have sufficient safeguards during mediation proceedings.<sup>120</sup> Failing an agreement on institutional rules or on how the mediator is to conduct the proceedings, the mediator in general will conduct the proceedings in the manner he considers appropriate.

#### 2.6.3 Disclosure of documents

Disclosure of documents depends entirely upon the agreement by the parties. Joint agreement and a good faith behaviour on the exchange of documents may limit the time and cost. Discovery, as known in the United States is not foreseen in mediation proceedings within Europe.

#### 2.6.4 Language and place

In cross border mediation proceedings, parties should specify the language of the mediation proceedings.

The place of mediation may have psychological, financial and legal impacts. Where no contractual provision exists, the parties and the mediator jointly agree on the place of mediation. Mediation shall be held at a place most convenient for all parties involved. The location should be neutral and offer all

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<sup>120</sup> Shane/Hassan, *Initiating an International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.01.

necessary amenities and facilities.<sup>121</sup> Without formal designation of the place of mediation there is no objective way of determining which national law applies to the mediation proceedings.

#### 2.6.5 Cost

The total cost of a mediation procedure is composed of two elements: fees and expenses. Expenses include those of administration that are incurred in all cases once the parties agree to pursue mediation. As mediation is likely to be a shorter process than either litigation or arbitration, there may also be economic arguments for attempting a mediated settlement.

Institutional rules generally include rules and procedures on the amount of mediation cost, including institutional fees and charges of the mediator as well as its allocation between the parties. Given the consensual nature of mediation proceedings, institutional rules generally allocate cost equally between the parties, unless they agree otherwise. Charges of a mediator may vary depending upon the service, the type of complexity of the subject matter and the qualification and expertise of the mediator. The issue of cost may be decisive when considering the person of the mediator and the assistance on a mediation institution. Sometimes, the case value may not warrant the fees of a particular administrator or mediator.<sup>122</sup>

Where the parties do not want application of institutional rules they should include regulations on cost already into their mediation agreement.

Even though often not relevant in commercial dispute settlement, it must be noted that neither the Austrian nor the European model provide for general

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<sup>121</sup> Shane/Hassan, *Initiating an International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.12.

<sup>122</sup> Shane/Hassan, *Initiating an International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.05.

legal aid for mediation proceedings. Legal aid would undoubtedly increase the attractiveness of mediation.<sup>123</sup>

#### 2.6.6 End

There is no set time limit for mediation. Parties should, however, set an overall time limit for the achievement of a mediated settlement, after which the dispute if not settled, will be referred to either litigation or arbitration.

### 2.7 Mediation settlement agreement

#### 2.7.1 Writing requirement

Where parties want to make sure that their mediation settlement agreement is enforceable, a lot is wrong with handshake, oral or gentlemen agreements. As there is no guarantee that parties fulfil the mediation settlement agreement, there should be a mechanism on non-performance. A party may either start over again and initiate litigation or arbitration to receive its claim or – where there exists a written settlement agreement – directly enforce the agreement.

Depending upon the parties' wishes regarding enforcement of the mediation settlement agreement, it may take different forms, ranging from a simple note to a private law contract, a notaries act, a court settlement or an arbitral award on consent. Whichever form is taken, parties must agree on the wording of the

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<sup>123</sup> Article 665 of the Belgian Judicial Code extends legal aid to the costs and fees of the mediator acting in a voluntary or court-instigated mediation, provided the mediation is conducted by an accredited mediator. See Demeyere, The Belgian Law on Mediation: An Early Overview in *Dispute Resolution Journal*, 1 November 2006, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200611/ai\\_n17194787/pg\\_6](http://findarticles.com/p/articles/mi_qa3923/is_200611/ai_n17194787/pg_6). Also Poland, as the first state in Eastern Europe, to enact detailed legislation on mediation in civil and commercial cases, knows some kind of financial implications with regard to the use of mediation. The Polish Mediation Law - enacted in July 2005 - includes financial incentives to encourage parties to use mediation steadily and frequently. For example, if a mediation settlement is reached in a case filed in court, the legislation provides that the plaintiff will recover three-quarters of the court fee already paid. See Pieckowski, How the New Polish Civil Mediation Law Compares with the Proposed EU Directive on Mediation in *Dispute Resolution Journal*, 1 August 2006, available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200608?pnun=7&opg=n16779628](http://findarticles.com/p/articles/mi_qa3923/is_200608?pnun=7&opg=n16779628).

content of the settlement agreement. Drafting may either be undertaken jointly by the parties' attorneys, the mediator<sup>124</sup> or by a third attorney, who was not involved in the mediation proceedings. As the phrasing of an oral agreement into writing may become a difficult task and lead to a new source for dispute, the mediator may assist the parties during the drafting procedure. It must be regarded whether national laws require a certain person to draft the mediation settlement agreement.

### 2.7.2 Scope

As stated above, the mediator has no power to decide on the merits of the case. The mediation settlement entirely depends upon joint agreement between the parties to the mediation proceedings. It is an essential exercise in mediation to thoroughly investigate acceptable settlement options.<sup>125</sup> Drafting of the mediation settlement agreement is of utter importance. The mediation settlement agreement should reflect all aspects of the oral agreement between the parties. Any mediation settlement should contain a succinct regulation on the scope of release. It may be global or with regards to specific claims only. Issues not included in the release should be referred to either arbitration or litigation. A mediation settlement agreement should contain both parties' economic and non-economic goals and interests, which may even go beyond legal issues and acknowledge broader interests of the parties. A mediation settlement agreement may further contain regulations regarding confidentiality.

Attention must further be paid to regulations on implementation of the terms of the agreement, timing and a modus for dispute settlement where execution of the mediation settlement agreement fails.

### 2.7.3 Enforceability

The enforcement procedure of mediation settlement agreements depends on the legal instrument containing the mediation settlement agreement. In general,

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<sup>124</sup> It must be considered whether the mediator may be excluded from drafting the mediation settlement agreement.

<sup>125</sup> Fisher/Ury, *Getting to Yes*<sup>2</sup> (1991) give useful insights in negotiation essentials.

mediation settlement agreements are contained in private law contracts, which are – in European jurisdictions – not enforceable per se. Lacking the *res judicata* status of court judgements or arbitral awards, private law contracts are not final. If a dispute relating to a private law contract emerges, it must be fully litigated as a contractual claim in front of state courts or arbitral tribunals. However, where enforcement is sought, a notary's act, court settlement or an arbitral award on agreed terms might be aspired. Of course it must be considered, whether national or international enforcement is sought.

Only a minor number of instruments contain regulations making a mediation settlement agreement itself an enforceable title. Section 20 of the Bermuda International Conciliation and Arbitration Act 1993 provides that, where a written settlement agreement is reached, it is to be treated as an award on an arbitration agreement for the purposes of its enforcement in Bermuda.<sup>126</sup> So far, the only international instrument introducing a provision making the mediation settlement agreement binding and enforceable is the UNCITRAL Model Law on Commercial Conciliation.<sup>127</sup> Article 14 UNCITRAL Model Law on Commercial Conciliation provides that "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable . . . [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]". Binder describes the UNCITRAL Model Law's provision on enforceability of mediation settlement agreements as "the most revolutionary concept of the entire Model Law and to a certain extent ... as a true innovation."<sup>128</sup> It is general practice in international arbitration to permit arbitral tribunals rendering arbitral awards on agreed terms. UNCITRAL Model Law on International Commercial Arbitration and the ICC Arbitration Rules provide for the possibility of including settlement agreements into an

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<sup>126</sup> See Rawding, ADR: Bermuda's International Conciliation and Arbitration Act 1993 in *Arbitration International*, Vol. 10 No. 1 (1993) p. 100.

<sup>127</sup> Art. 14 UNCITRAL Model Law on Commercial Conciliation.

<sup>128</sup> Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*<sup>2</sup> (2005) p. 342.



award on consent.<sup>129</sup> Article 12 of the Stockholm Chamber of Commerce Mediation Institute's Rules<sup>130</sup> state that upon reaching a settlement agreement the parties may, subject to the approval of the mediator, agree to appoint the mediator as an arbitrator and request him to confirm the mediation settlement agreement in an arbitral award. This provision is based upon the demand for enforceable mediation settlement agreements. Indeed, the Stockholm Chamber of Commerce Mediation Institute's Rules are a pioneer with regard to providing for a means of making mediation settlement agreements enforceable. However, there may be a certain danger, that the aim cannot be achieved.<sup>131</sup>

For further comments on enforceability of the mediation settlement agreements in the form of a private law contract, a notary's act, court settlement and an arbitral award on agreed terms see section 3.7.3 below.

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<sup>129</sup> Art. 30 UNCITRAL Model Law on Commercial Arbitration; art. 26 ICC Arbitration Rules, available at <http://www.iccwbo.org/court/arbitration/id4093/index.html>.

<sup>130</sup> The Stockholm Chamber of Commerce was founded in 1902. The Arbitration Institute of the Stockholm Chamber of Commerce was established in 1917 and is a separate entity within the Stockholm Chamber of Commerce. The Stockholm Chamber of Commerce Mediation Institute followed later on 1 April 1999. It aims at assisting the settlement of domestic and international disputes in accordance with the Stockholm Chamber of Commerce Mediation Institute's Rules. The Stockholm Chamber of Commerce Mediation Institute is organised through a board assisted by a secretariat. The Stockholm Chamber of Commerce issues a newsletter focusing on international arbitration and mediation twice a year. For further information on the Stockholm Chamber of Commerce see <http://www.sccinstitute.com/uk/Home/>. For further information on the Stockholm Chamber of Commerce Mediation Institute see [http://www.sccinstitute.com/uk/SCC\\_Mediation\\_Institute/](http://www.sccinstitute.com/uk/SCC_Mediation_Institute/). See also Bühring-Uhle, Traditional Mediation vs. Modern Mediation in Stockholm Arbitration Newsletter No. 1 (2001) p. 3.

<sup>131</sup> See section 3.7.3.3 below. Based upon article 12 Stockholm Chamber of Commerce Mediation Institute's Rules, Lionnet/Lionnet state that there are sincere legal concerns against this way of securing enforcement of a mediation settlement agreement. Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 62.

## 2.8 Procedural considerations

### 2.8.1 Court proceedings

Unless they agree otherwise, parties are free to commence or to continue litigation or arbitration, despite being in the process of mediation. However, filing a claim with a state court or an arbitral tribunal shall not disturb mediation proceedings.<sup>132</sup> If possible (e.g. limitation), parties should agree to refrain from initiating state court or arbitration proceedings during the course of mediation proceedings. Several institutional rules reflect this approach.

### 2.8.2 Limitation

Some jurisdictions have regulations providing for an interruption of limitation periods for the time parties engage in settling their dispute through mediation. The Mediation Act<sup>133</sup> is an example for such legislation. Where neither the law nor institutional rules provide for a suspension of time periods, parties may want to consider this issue in their mediation agreement. Parties may agree on a standstill of all limitation periods and may even extend this agreement to disputes, which have been referred to adjudicatory bodies prior mediation has been initiated. The purpose of the standstill agreement is to freeze the parties' rights during the course of mediation.<sup>134</sup>

### 2.8.3 The role of law in mediation

The question which role law plays in mediation deserves some attention. The question whether a mediator must have certain knowledge on the legal background of the field of mediation is controversial among practitioners of mediation. While mediation practitioners having a legal professional

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<sup>132</sup> Eidenmüller, Vertrags- und Verfahrensrecht der Wirtschaftsmediation: Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle (2001) p. 12 et seq.

<sup>133</sup> Mediation Act, supra note 11.

<sup>134</sup> Abramson, Representing Clients in Mediation, in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> sec. II. 3.03.

background emphasize the importance to consider at least mandatory law, their colleagues from other professions follow the approach that everything is possible in mediation as long as it is the parties' common understanding. Indeed, the role of the law with regard to mediation is often underestimated and deserves more attention in the mediator's practice and during mediation training. Little has so far been stated about the role of law in mediation, the implications of settlement agreements contrary to mandatory law, restrictions to enforcement and the potential liability of the mediator. Some commentators solely state that mediation should be conducted "in the shadow of the law". In fact, law has an important role in mediation.<sup>135</sup>

Almost every mediation proceeding is based upon a mediation agreement, a formal contract between the parties, mainly in writing, including amongst others information about the parties, the mediator and the principles of mediation. It may further contain a reference to institutional rules regulating the mediation procedure or a reference to codes of conduct regarding the mediator's behaviour. In addition there might be a contract regulating the relationship between the parties and the mediator, specifically dealing with the mediator's fees. Where a party or the mediator infringes their duties and liabilities, there may be a sanction contained in a contract or in statutory law.

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<sup>135</sup> Pruckner, *Recht der Mediation* (2003) p. 45 et seq; Fuchshuber, *Mediation im Zivilrecht – Neue Wege zur Konfliktlösung* (2004) p. 14; Eidenmüller, *Vertrags- und Verfahrensrecht der Wirtschaftsmediation: Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle* (2001) p. 1 et seq.; Fitsch, *Rechtsfragen des Mediationsvertrages (Teil II) – Rechtsfolgen und Sonderfragen* in JAP 2000/2001, p. 139 et seq.; Ripke, *Recht und Gerechtigkeit in der Mediation* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 5 mn 11; Bernhardt/Winograd *Zusammenarbeit zwischen Rechtsanwälten und Psychologen* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 23 mn 92 et seq.; Heß/Sharma, *Rechtsgrundlagen der Mediation* in Haft, *Handbuch Mediation* (2002) § 26 mn 1 et seq.; Hagen, *Recht und Mediation* in Hagen/Lenz, *Wirtschaftsmediation: Theorie, Verfahren, Technik, Praxis* (2008) p. 156 et seq.; Breidenbach, *Mediation: Struktur, Chancen und Risiken von Vermittlung im Konflikt* (1995) p. 287 et seq.; Wiedermann/Fucik/Ferz, *Das Recht der Mediation – gesetzliche Verankerung der Mediation in Kleindienst-Passweg/Wiedermann/Proksch* (ed.) *Handbuch Mediation* (2008) register 3.

Every dispute that may become subject to mediation relates to a field of law (civil law, commercial law, family law, employment law, environmental law, administrative law). A dispute without any relation to legal provisions is hardly to imagine. Statutory provisions provide standards and boundaries for settlement options and may be the basis for establishing creative solutions. Furthermore, parties may want to keep the statutory provisions upon which a judge or arbitrator would base its decisions as per a benchmark for comparison with their mediation settlement agreement in mind during mediation proceedings.<sup>136</sup>

Mediators must conduct mediation proceedings in the shadow of the law, meaning that the mediation settlement agreement must be within mandatory provisions of the relevant national jurisdiction. Indeed, the mediator must keep the mediation process within mandatory law, needs to have a basic understanding of the applicable legal field and may have a duty to point at relevant legal provisions.<sup>137</sup> Even though the mediator is not a legal advisor he must at least have basic legal understanding allowing him to inform the parties that they should consult an attorney regarding certain legal questions arising in the course of mediation proceedings.<sup>138</sup> Where the mediator infringes the duty to inform about relevant legal circumstances he may become liable for damages.<sup>139</sup> The mediator must further observe the principles of due process. A

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<sup>136</sup> Ripke, *Recht und Gerechtigkeit in der Mediation* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 5 mn 18.

<sup>137</sup> Sec. 1299 Civil Code (Allgemein bürgerliches Gesetzbuch, ABGB) JGS Nr. 946/1811. Fitsch, *Rechtsfragen des Mediationsvertrages* (Teil II) – Rechtsfolgen und Sonderfragen in JAP 2000/2001, p. 139.

<sup>138</sup> See Bernhardt/Winograd, *Zusammenarbeit zwischen Rechtsanwälten und Psychologen* in Haft/Schlieffen (ed.) *Handbuch Mediation* (2002) § 23 mn 94 et seq.

<sup>139</sup> Fitsch, *Rechtsfragen des Mediationsvertrages* (Teil II) – Rechtsfolgen und Sonderfragen in JAP 2000/2001, p. 139.

party may want to attack a mediation settlement agreement where it considers the process to be flawed.<sup>140</sup>

At the end of the mediation procedure, many parties aim at including the mediation settlement agreement into an enforceable instrument. The basis for such instruments is the law. Every mediation settlement agreement contained in a private law contract is subject to general principles of the law. Where the content of the mediation settlement agreement is inconsistent with mandatory law or *contra bonos mores*, a party may initiate adversarial proceedings and challenge the content of the mediation settlement agreement aiming at final dispute settlement.<sup>141</sup> Also in case a party fails to fulfil the mediation settlement agreement the other party must enforce the mediation settlement agreement with the assistance of state courts or, if the mediation settlement agreement was not included in an enforceable document – even address the dispute to a state court and go through a lengthy dispute settlement procedure again. Enforcement of mediation settlement agreements depends on its compatibility with public policy. If mediation fails, the parties may institute state court or arbitration proceedings.

It is therefore beyond doubt that the law plays an important role in mediation. It must be considered before, during and after the mediation proceedings.

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<sup>140</sup> Bühring-Uhle/Scherer/Kirchhoff, *Arbitration and Mediation in International Business*<sup>2</sup> (2006) p. 234.

<sup>141</sup> Fitsch, *Rechtsfragen des Mediationsvertrages (Teil II) – Rechtsfolgen und Sonderfragen* in JAP 2000/2001, p. 139.

### 3. Statutory rules on mediation

Section 3 is dedicated to describe the status of the law relating to mediation in Austria, with a view on the provisions of the Mediation Directive. It provides information on the mediation agreement, the mediation procedure, the mediator and the mediation settlement agreement. It helps the reader to understand what must essentially be considered when opting for mediation in Austria and thoroughly analyses legal issues, taking into account the interests of practitioners, mediators and potential parties to mediation.

#### 3.1 The Austrian Mediation Act and the European Mediation Directive

Following consultations between the Federal Ministry of Justice and mediation-focused organisations, on 1 May 2004 Austria enacted the federal Law on Mediation in Civil Matters<sup>142</sup> and herewith became the first country in the

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<sup>142</sup> Mediation Act, *supra* note 11. See Falk/Koren, *ZivMediatG – Mediationsgesetz – Kurzkommentar* (2005); Wiedermann/Fucik/Ferz, *Das Recht der Mediation – gesetzliche Verankerung der Mediation in Kleindienst-Passweg/Wiedermann/Proksch* (ed.) *Handbuch Mediation* (2008) register 3; Ferz/Filler, *Mediation – Gesetzestexte und Kommentar* (2003); Knötzl/Zach, *Taking the Best from Mediation Regulations – The Mediation Directive and the Austrian Mediation Act in Arbitration International*, Vol. 23 No. 4 (2007) p. 663 et seq.; Pruckner, *Recht der Mediation* (2003); Feil, *Zivilrechts-Mediationsgesetz in GesRZ 2003*, XXI; Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 153 et seq.; Placheta/Seiwald/Sivec, *Wirtschaftsmediation in Österreich – Die neue Form der Konfliktlösung* (2005). For further literature on the development of mediation in Europe see Gottwald, *Gerichtsnähe Mediation in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 17 mn 18 et seq.; Trossen, *Integrierte Mediation in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 18 mn 62 et seq.; Heß/Sharma, *Rechtsgrundlagen der Mediation in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 26; Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 92 et seq.; For a brief description of the laws on mediation in Austria, Germany, France, England, Scotland, Wales, Denmark, Sweden, Norway, Finland, Bosnia-Herzegovina, Bulgaria, Croatia, Poland and Slovakia see Filler, *Recht der Mediation im europäischen Vergleich in Kleindienst-Passweg/Wiedermann/Proksch* (ed.) *Handbuch Mediation* (2008) register 13, sec. 3.

European Union to provide detailed regulations regarding mediation.<sup>143</sup> The Mediation Act in particular provides a definition of mediation, deals with the scope of its applicability, the preconditions and procedure for registering mediators and institutions providing mediation training, as well as with the establishment and tasks of the council of mediation and the mediators' rights and duties. The Mediation Act applies only to mediators who are named in the list of mediators.<sup>144</sup> The Federal Minister of Justice maintains this list. It is published on the Internet<sup>145</sup> and includes useful information regarding the mediator's personality, profession and education.<sup>146</sup>

Although the recent approval of the Mediation Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters<sup>147</sup> brought a wish list for some further reform of the

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<sup>143</sup> The first official mediation initiative was the model project was introduced in 1993 and considered mediation in family dispute contexts. The concept was based upon a co-mediation carried out by two mediators, one having a psychological and therapeutic background, and the other having legal knowledge. It aimed at providing the parties to such family disputes with the option of solving their problems through the mediation procedure based on self-dependence and consent. As a consequence of this project, section 39c of the Law on Equalization of the Family Burden (Familienlastenausgleichsgesetz, FLAG) BGBl. Nr. 376/1967 introduced government aid for family mediation as of 1 January 2000. Following this model project, the legislature introduced provisions regarding the applicability of mediation to section 99 of Amendment to the Matrimony Law 1999 (Eherechtsänderungsgesetz, EheRÄG 1999) BGBl. I Nr. 125/1999 and article XVI of Amendment to the Law of Parent and Child 2001 (Kindschaftsrechts-Änderungsgesetz 2001, KindRÄG) BGBl. I Nr. 135/2000. Subsequently, section 320 of the Civil Procedure Code and section 152 of the Criminal Procedure Code were amended with respect to the mediators' duty of confidentiality. See Knötzl/Zach, The Mediation Directive and the Austrian Mediation Act in *Arbitration International*, Vol. 23 No. 4 (2007) p. 667 et seq.

<sup>144</sup> Sec. 3 (1) no. 2 Mediation Act.

<sup>145</sup> <http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatoren.nsf/docs/home>.

<sup>146</sup> Sec. 8 Mediation Act.

<sup>147</sup> Mediation Directive, supra note 8. The Mediation Directive came about as a result of the various Member States recognising the merits of alternative dispute resolution, mediation in particular, and their desire to create alternative, extrajudicial procedures for dispute resolution

Mediation Act, currently, there are no legislative projects.<sup>148</sup> Until June 2011 Austria will have to amend the Mediation Act with regard to cross-border disputes. Even though the Mediation Act largely complies with the European Directive's requirements already, there are several respects that request sensible rethinking about mediation. Inevitably there will evolve a debate about whether and how the Mediation Act should be amended.

### 3.2 Mediation

#### 3.2.1 What is mediation?

For the purposes of the Mediation Act, "mediation is a voluntary activity in which a technically trained, neutral intermediary (mediator) uses excepted methods to systematically foster communication between the disputing parties with the aim of facilitating a resolution of their conflict for which the parties themselves are responsible."<sup>149</sup>

The Mediation Directive defines mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator."<sup>150</sup>

Basically, the Mediation Act and the Mediation Directive define mediation in the same way.

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in order to improve access to justice in Europe. This led to a Green Paper in 2002, followed by a broad consultation and finally a proposal which formed the basis of the Mediation Directive.

<sup>148</sup> For a comparison of key issues related to the statutory provisions on mediation of the Austrian Mediation Act and the European Mediation Directive see Knötzl/Zach, *The Mediation Directive and the Austrian Mediation Act in Arbitration International*, Vol. 23 No. 4 (2007) p. 663 et seq. See further Knötzl/Zach, *Österreich fällt bei Mediation zurück in Der Standard*, 4 June 2008, p. 30.; Filler, *EU – Richtlinie über bestimmte Aspekte der Mediation in Zivil- und Handelssachen in Kleindienst-Passweg/Wiedermann/Proksch, Handbuch Mediation* (2008) register 13, sec. 2.

<sup>149</sup> Sec. 1 (1) Mediation Act.

<sup>150</sup> Art. 3 (a) Mediation Directive.



### 3.2.2 Fields of application

The Mediation Act applies to mediation in civil matters.<sup>151</sup> Mediation in civil matters means “all conflicts that the regular civil courts have jurisdiction to decide.”<sup>152</sup> The regular civil courts are the district court, regional court, labour and social court, and the commercial court. Civil matters to be referred to the regular civil courts include for example disputes regarding family law (divorce, paternity, alimony, heritage, parentage), property law (real estate, intrusion, lease, rent, real estate ownership), law of obligations (warranty, compensation for damages, unjust enrichment), employment law (dismissal, discharge, remuneration) and commercial disputes (between companies).<sup>153</sup> It must be noted that mediation is in commercial contexts – contrary to family and environmental contexts – not well known in Austria.<sup>154</sup>

The Mediation Act does for example not apply to administrative procedures, criminal proceedings and peer mediation. Even though not within the scope of the Mediation Act, mediation is used in criminal contexts<sup>155</sup> and in administrative procedures<sup>156</sup>. Disputes having the main source in administrative law may become subject to mediation according to the Mediation Act if for example a neighbourhood dispute emerges with regard to an administrative procedure regarding licensing of an industrial plant.<sup>157</sup>

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<sup>151</sup> Sec. 3 (1) no. 1 Mediation Act.

<sup>152</sup> Sec. 1 (2) Mediation Act.

<sup>153</sup> See also Fuchshuber, *Mediation im Zivilrecht – Neue Wege zur Konfliktlösung* (2004) p. 5.

<sup>154</sup> Filler, *Zum Stand der Akzeptanz der Wirtschaftsmediation im europäischen Vergleich* in Gruber/Pichler (ed.) *Wirtschaftsmediation zwischen Theorie und Praxis* (2005).

<sup>155</sup> Secs. 90a-90m Criminal Procedure Code.

<sup>156</sup> Secs. 16 and 24a Environmental Impact Assessment Act 2000 (Umweltverträglichkeitsprüfungsgesetz, UVP-G) BGBl. Nr. 697/1993.

<sup>157</sup> Fuchshuber, *Mediation im Zivilrecht – Neue Wege zur Konfliktlösung* (2004) p. 5

As the Mediation Act, the Mediation Directive applies to civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law, including revenue, customs and administrative matters, and particularly frequent in family law and employment law.<sup>158</sup> The Mediation Directive does further not apply to pre-contractual negotiations or to processes of an adjudicatory nature, such as consumer complaint schemes, arbitration or expert determination.<sup>159</sup>

### 3.2.3 National and international mediation

The Mediation Act is, in principle, valid for all mediation proceedings undertaken by mediators named in the list of mediators.<sup>160</sup> A distinction between national and international mediation is not foreseen in the Mediation Act. Consequently, the Mediation Act applies to national and international mediation proceedings, as long as the mediator is enrolled in the list of mediators.

The Mediation Directive only applies to legislation dealing with cross-border disputes – where at least one of the parties is domiciled or habitually resident in a Member State other than that of any other parties.<sup>161</sup> Member States will have to decide whether they want to limit their implementing legislation to cross-border cases or whether they also want to apply the provisions of the Mediation Directive to domestic cases. Although the European Directives' scope is limited to cross-border disputes it is likely to pervade civil justice thinking more widely.

As the Mediation Directive allows Member States to provide for qualification standards for mediators, the limitation of the Mediation Act to mediation proceedings undertaken through a registered mediator is in compliance with the

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<sup>158</sup> Art. 1 (2) and sec. 10 Preamble Mediation Directive.

<sup>159</sup> Sec. 11 Preamble Mediation Directive.

<sup>160</sup> Sec. 3 (1) no. 2 Mediation Act.

<sup>161</sup> Art. 2 (1) Mediation Act.

Mediation Directive.<sup>162</sup> As the Mediation Act does further apply to national as well as to international mediation proceedings, there seems to be no need for reform regarding the scope of application of the Mediation Act.

### 3.2.4 Voluntariness

The principle of voluntariness probably bears the most potential for discussion. Even though basically both, the Mediation Act<sup>163</sup> and the Mediation Directive<sup>164</sup> handle the principle of voluntariness as a basic principle of mediation, there are significant differences in its restrictions. Indeed, the Mediation Directive brought potential for rethinking whether to introduce elements of compulsion into the mediation (selection) process.

According to the Mediation Act, participation in mediation must be voluntary at any time, at the beginning, during the process and at the end of the mediation process.<sup>165</sup> Consequently, mediation entirely depends on the will of the parties to participate in the mediation process. The Austrian Supreme Court in its decision of 15 July 1997 explicitly stated the principle of voluntariness.<sup>166</sup> The Austrian Supreme Court concluded that mediation cannot be initiated contrary to the will of one of the parties.<sup>167</sup> However, it does not infringe on the principle

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<sup>162</sup> Sec. 16 Preamble Mediation Act.

<sup>163</sup> Secs. 1 (1), 16 (1) and 17 (1) Mediation Act.

<sup>164</sup> Art. 3 (a) and secs. 10 and 13 Preamble Mediation Directive.

<sup>165</sup> Section 1 (1) of the Mediation Act includes the principle of voluntariness. Accordingly, mediation is a voluntary process. Other provisions of the Mediation Act also reflect the principle of voluntariness. Pursuant to section 16 (2) of the Mediation Act, the parties' agreement to submit their dispute to mediation is a precondition for mediation. Moreover, according to section 17 (1) of the Mediation Act, mediation ends if any of the parties or the mediator himself declares that the mediation process is terminated.

<sup>166</sup> Austrian Supreme Court (Oberster Gerichtshof, hereinafter „OGH“) OGH 15 July 1997, 1 Ob 161/97a.

<sup>167</sup> OGH 15.7.1997, 1 Ob 161/97a.

of voluntariness if a judge proposes mediation and suspends proceedings.<sup>168</sup> The Mediation Act accordingly included a provision providing judges with the option to suggest an out of court dispute resolution to the parties.<sup>169</sup> Similar provisions were included in other Austrian acts<sup>170</sup> as well as in other jurisdictions<sup>171</sup> and the Mediation Directive<sup>172</sup>. However, the Mediation Directive provides more scope for restriction of voluntariness. Not only that courts may suggest mediation<sup>173</sup>, they have the competence to even order it.<sup>174</sup> In addition, the law of a Member State may prescribe mediation.<sup>175</sup> The definition of mediation clarifies that the Mediation Directive does not preclude compulsory mediation, but expressly contemplates that national legislation can provide for compulsory mediation.<sup>176</sup> In addition it makes clear that mediation's voluntary nature relates to voluntary continued participation in the process once started, and not to the question of whether to participate in the first place, which may be made compulsory by order of a judge or by statutory provision.<sup>177</sup> Some authors

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<sup>168</sup> Explanatory Notes, p. 19; Feil, Zivilrechts-Mediationsgesetz in GesRZ 2003, XXI.

<sup>169</sup> Sec. 204 (1) Civil Procedure Code.

<sup>170</sup> Secs. 13 (3), 108 Non-contentious Proceedings Act (Außerstreitgesetz, AußStrG) BGBl. I Nr. 111/2003; art. 177a (1) and (2) Civil Code.

<sup>171</sup> Art. 131-1 to 131-15 French Civil Procedure Code. See also section 2.5.1 on voluntariness above.

<sup>172</sup> Art. 3 (a) and sec. 13 Preamble Mediation Directive.

<sup>173</sup> Art. 5 (1) Mediation Act.

<sup>174</sup> Arts. 2 (1) (a), (b) and 3 (a) Mediation Directive.

<sup>175</sup> Arts. 2 (1) (a), (b) and 3 (a) Mediation Directive.

<sup>176</sup> Art. 3 (a) of the Mediation Directive defines mediation as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a member state."

<sup>177</sup> See Allen, Implementing the EU Directive on mediation (2008), available at [www.linexlegal.com](http://www.linexlegal.com).

contemplate that compulsory mediation would amount to a denial of access to justice and thus a breach of article 6 of the Human Rights Convention.<sup>178</sup> Articles 5 of the Mediation Directive will, it is hoped, put an end to the suggestion that ordering mediation contravenes article 6 of the Human Rights Convention.<sup>179</sup> Indeed, there are already elements of compulsion in certain states of the European Union.<sup>180</sup> Another difference lies in the options for sanctions where a party refuses to participate in mediation. While a party's refusal to participate in mediation cannot have any positive or negative influence on the party's legal position under the Mediation Act<sup>181</sup>, the Mediation Directive allows Member States to make mediation compulsory or subject to incentives or sanctions.<sup>182</sup> Such sanctions could be in the form of cost awards in adversarial proceedings. The most prominent example in this regard is the decision of Lord Justice Brooke of the English Court of Appeals who in 2002 gave judgment refusing to award costs to the winning party, Railtrack.<sup>183</sup> He based this order on Railtrack's refusal to contemplate alternative dispute resolution at a stage before the costs of the appeal started to flow. As this decision has been confirmed afterwards not only in England, it may be expected that such court orders will become more eminent within European

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<sup>178</sup> See e.g. the decision of the English Court of Appeals in *Halsey v Milton Keynes General NHS Trust and Steel v JOY and HILLIDAY*. See section 2.5.1 on voluntariness above. See also Craig, *Mediation: The new Mediation Directive* (2008), available at [www.linexlegal.com](http://www.linexlegal.com). Craig states that "there is a world of difference between deferring trial or the continuation of proceedings pending mediation, and an absolute refusal to permit access to a Court and a compulsion to mediate, to the exclusion of judicial determination. Perhaps, instead of direct and enforceable measures, we will see (much) greater pressure applied by the Courts in EU Member States, and by our judiciary, to "encourage" parties to mediate."

<sup>179</sup> Allen, *Implementing the EU Directive on mediation* (2008), available at [www.linexlegal.com](http://www.linexlegal.com).

<sup>180</sup> See section 2.5.1 on voluntariness above.

<sup>181</sup> Ferz/Filler, *Mediation – Gesetzestexte und Kommentar* (2003) p. 26.

<sup>182</sup> Sec. 14 Preamble Mediation Directive.

<sup>183</sup> The judgment is available at <http://www.hmcourts-service.gov.uk>. For further comments see section 2.5.1 on voluntariness above.

jurisdictions. A proposal to amend the German Civil Procedure Code in this regard has already been voiced.<sup>184</sup>

Even though it is for course plainly desirable to bring judges and attorneys on the mediation track – through the judges' competence to recommend (or even order) mediation and the attorneys' duty to inform parties about mediation – there is still a lot to do if mediation should become a serious alternative to adversarial proceedings in Austria and within the European Union. Judges' mandate to suggest or order mediation where appropriate is undoubtedly an eminent tool to foster mediation. The state must then however secure that judges get trained in mediation enabling them to make an informed choice when suggesting or ordering mediation to potential parties. However, another aspect deserves sincere attention. Court ordered mediation is often less successful as contractual mediation.<sup>185</sup> It only takes place when the lawsuit is underway and the parties have already exchanged their pleadings. This may sometimes be too late. Judges, attorneys and parties may consider that mediation may only result in additional costs and further delay in the settlement of the case. It should be secured that parties are informed about mediation at the earliest time possible, immediately after the claim arrives at court or a party presents the dispute to an attorney. But, who should be responsible for providing parties with the information about mediation? As there still is a high number of judges, attorneys and potential parties to mediation which are not aware of what the mediation process really is or which are sceptical as to its likelihood of success, information about mediation should be provided to the parties by a mediator. Currently, it is often still the task of the trial judge or the party attorney to inform parties in dispute about mediation. This inevitably leads to the result that persons coming from an adversarial background may influence the decision of the parties whether to try to settle their dispute through

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<sup>184</sup> See Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 236 et seq.

<sup>185</sup> According to CMAP's statistics the rate of success of court-ordered mediations is 10 points lower than that of contractual mediations which is at 76%. See Jaeger/Watkins, *Commercial Mediation in France* (undated) available at <http://www.cmap.fr/pdf/Intervention%20LJA%20New%20York%2015%20septembre%202006.pdf>.

mediation. As there still exists some reluctance within the profession of lawyers, it seems that they are not the best candidates for giving them the task to inform parties about mediation as an alternative to adversarial proceedings – at least where they do not have attended a specific minimum training on mediation.

A promising tool to foster the understanding of mediation would have been the initial proposal of the European Commission, which provided that a court has the right to oblige the parties to attend an information session on what mediation is all about. Unfortunately, this provision was not adopted in the Mediation Directive.

### **3.2.5 Parties' duties**

The parties shall (i) negotiate according to the principles of mediation, (ii) aim at achieving a mutual negotiated settlement, (iii) disclose all relevant information, (iv) treat any information disclosed in relation to the mediation procedure confidential, (v) not arbitrarily change the circumstances of the mediation matter, (vi) omit taking legal action regarding the mediation matter and (vii) abstain to nominate the mediator as witness in subsequent court proceedings.<sup>186</sup> If a party infringes any of these duties, the injured party may claim compensation of its damages. Proving damage and the causality may however be a difficult task.<sup>187</sup> The Mediation Directive does not contain any explicit regulations regarding parties' rights or duties in mediation proceedings. Obviously there is no need for reform with regard to the legislation in Austria.

### **3.2.6 Mediation procedure**

Both, the Austrian and the European model contain little determination of the mediation procedure. Distinction must be made between the initiation, the conduct and termination of mediation proceedings. While both sets of rules deal with the beginning and the end of mediation (basically because of limitation) the conduct of the mediation proceedings remains unregulated.

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<sup>186</sup> Pruckner, *Recht der Mediation* (2003) p. 26.

<sup>187</sup> Pruckner, *Recht der Mediation* (2003) p. 26.

The Mediation Act and the Mediation Directive both set the beginning of mediation proceedings at the time when the parties agree to use mediation.<sup>188</sup> While currently, in Austrian mediation proceedings may only be initiated if there exists an agreement to mediate between the parties, mediation according to the Mediation Directive may also start where mediation is ordered by a court or an obligation to use mediation arises under national law.<sup>189</sup>

Neither the Mediation Act nor the Mediation Directive contains regulations regarding the conduct of the mediation proceedings. However, the general understanding of mediation allows drawing some conclusions as to how procedural issues will be established. As mediation is characterized through a high level of party autonomy, the parties will generally determine the procedure. The parties are free to determine the mediation procedure through special provisions in the mediation agreement or by reference to certain codes of conduct or procedural rules. Failing any such agreement between the parties, the mediator shall determine the procedure, as the mediator considers appropriate according to the mediator's discretion. During the mediation procedure, the mediator is responsible for the conduct of the procedure. Neither Austrian law nor European regulations state whether mediation proceedings shall be conducted orally or in writing. It may however be argued that mediation is a process with requests oral communication. However, it may be helpful in several stages of the mediation proceeding to present written submissions to the mediator and the other parties. Provisions about the time periods within which a mediator or the parties must perform certain procedural steps are not contained in the regulations.

According to the Mediation Act, mediation proceedings end (i) with a mediation settlement agreement, (ii) mutual agreement or (iii) termination by a party or the mediator. A party can terminate mediation proceedings without stating any reason. The mediator's termination is subject to important reasons.<sup>190</sup> A party

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<sup>188</sup> See sec. 15 Preamble Mediation Directive; sec. 22 Mediation Act.

<sup>189</sup> Art. 2 (1) (a) – (d) Mediation Directive.

<sup>190</sup> Pruckner, *Recht der Mediation* (2003) p. 53.



constantly infringing its duties or the impossibility of conducting mediation proceedings according to the principles of mediation qualify as important reasons.<sup>191</sup> The Mediation Directive solely states that parties may terminate mediation proceedings at any time.<sup>192</sup>

### 3.2.7 Attorneys

Attorneys may have several tasks related to mediation proceedings. According to the professional regulations, the Attorneys Act<sup>193</sup> and the Code of Practice for Attorneys,<sup>194</sup> attorneys may (i) represent and advice parties before, during and after mediation, (ii) become involved in drafting a mediation settlement agreement or (iii) even act as mediators themselves. Steinacher states that the comprehensive professional tasks of attorneys include conflict management and change management.<sup>195</sup> The attorney as conflict manager should not only concentrate upon single interests but also broaden his view to the whole conflict.<sup>196</sup> The role of a change manager in merger and acquisition is to consider not only legal due-diligence but also including soft facts such as potential integration conflicts pre and post acquisition.<sup>197</sup> Attorneys, which are open for accepting new processes, may open a new field of practice and go with the trend of alternative dispute settlement.

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<sup>191</sup> Pruckner, *Recht der Mediation* (2003) p. 53.

<sup>192</sup> Sec. 13 Preamble Mediation Directive.

<sup>193</sup> Attorneys' Act (Rechtsanwaltsordnung, RAO) RGBI. Nr. 96/1868 last amendment BGBl. I Nr. 164/2005.

<sup>194</sup> Secs. 63-69 Code of Practice for Attorneys (Richtlinien für die Ausübung des Rechtsanwaltsberufes, RL-BA).

<sup>195</sup> Steinacher, *Anwaltliches Berufsbild und Mediation in AnwBI* 2003, 129 et seq.

<sup>196</sup> Steinacher, *Anwaltliches Berufsbild und Mediation in AnwBI* 2003, 129.

<sup>197</sup> Steinacher, *Anwaltliches Berufsbild und Mediation in AnwBI* 2003, 129 et seq.

For further information on the question under what conditions attorneys may act as mediators see section 3.3.1 below. For a discussion of attorneys' tasks as party representative or party adviser see section 2.4.2 above.

### 3.2.8 Applicable law

The parties may choose the applicable substantive law, either in the main agreement, the mediation agreement or in a written supplemental agreement. The parties may also agree upon the application of foreign law.

The Mediation Act does not contain any specific provisions for the determination of the law applicable to the substance of the dispute. In contract law, the Austrian Private International Law<sup>198</sup> recognises the freedom of the parties to determine the applicable law.<sup>199</sup> According to section 1 (1) of the Austrian Private International Law, the fundamental element of Austrian Private International Law is the "closest connection". In the absence of a choice of law the principle of characteristic performance applies.<sup>200</sup> In addition, there are several provisions for specific types of contracts, e.g. licence agreements, financial transactions, consumer transactions as well as employment agreements. In addition, the Convention on the Law Applicable to Contractual Obligations<sup>201</sup> must be considered. The principles of Austrian Private International Law correspond to those of the Rome Convention.

## 3.3 The mediator

### 3.3.1 Who is a mediator?

According to section 1 (1) of the Mediation Act, the mediator is a "professionally trained neutral facilitator who uses recognised methods to systematically

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<sup>198</sup> Private International Law (Bundesgesetz über das internationale Privatrecht, IPRG) BGBl. Nr. 304/1978.

<sup>199</sup> Sec. 35 (1) Austrian Private International Law.

<sup>200</sup> Sec. 35 (2) Austrian Private International Law.

<sup>201</sup> Convention on the Law Applicable to Contractual Obligations („Rome Convention“) 80/934/EEC, Official Journal L 266, 9 October 1980, p. 0001 – 0019.

encourage communication between the parties, with the aim of enabling the parties to themselves reach a resolution of their dispute.”

The Mediation Act applies only to mediators who are registered on the list of mediators.<sup>202</sup> Registered mediators have gone through a specific training which assures a certain quality standard of the mediation. The Federal Minister of Justice maintains the list of mediators. It is published on the Internet<sup>203</sup> and includes useful information regarding the mediator’s profession and education.<sup>204</sup> Not registered mediators can act as mediators in civil matters as well. Important regulations of the Mediation Act, including those on suspension of limitation periods<sup>205</sup> and confidentiality<sup>206</sup> do however not apply in such case.

The Mediation Act does not attach the profession of the mediator to another specific profession. Rather everybody may become a mediator. However, there are certain professions, which see themselves specifically qualified to become mediators, including amongst others psychologists and lawyers.

If an attorney acts as mediator the attorney must consider professional regulations<sup>207</sup>, the Attorneys’ Act and the Code of Practice for Attorneys.<sup>208</sup> The attorney acting as mediator must act strictly personally.<sup>209</sup> He cannot

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<sup>202</sup> Sec. 3 (1) no. 2 Mediation Act. For a description of the duties of the mediator see Wiedermann/Fucik/Ferz, Das Recht der Mediation – gesetzliche Verankerung der Mediation in Kleindienst-Passweg/Wiedermann/Proksch (ed.) Handbuch Mediation (2008) register 3, sec. 1.5.

<sup>203</sup> [www.mediatorenliste.justiz.gv.at/mediatoren/mediatoren.nsf/docs/home](http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatoren.nsf/docs/home).

<sup>204</sup> Sec. 8 Mediation Act.

<sup>205</sup> Sec. 22 Mediation Act.

<sup>206</sup> Sec. 320 no. 4 Civil Procedure Code; sec. 152 (1) no. 5 Criminal Procedure Code.

<sup>207</sup> Sec. 8 (5) Attorneys’ Act.

<sup>208</sup> Code of Practice for Attorneys (Richtlinien für die Ausübung des Rechtsanwaltsberufes, RL-BA).

<sup>209</sup> Sec. 69 Code of Practice for Attorneys.

subcontract the mediation mandate.<sup>210</sup> An attorney may act as mediator based upon an agreement by the parties. He must inform the parties that he acts as mediator. The attorney acting as mediator has a strict duty to inform the parties about their rights and duties and is liable for damages.<sup>211</sup> He is obliged to inform the parties about issues, which may have an impact upon his impartiality and neutrality and must decline or end the mediation mandate if he considers himself biased.<sup>212</sup> The mediation agreement, the main principles of the mediation procedure and the aim of the mediation must be agreed upon in writing.<sup>213</sup> The mediation settlement agreement may be recorded in writing.<sup>214</sup> In general attorneys must observe the strict duty to confidentiality.<sup>215</sup> They may however be released from the duty to confidentiality.<sup>216</sup> The attorney acting as mediator may – after being assigned by parties not represented by an attorney or after express approval of the parties' attorneys – record the mediation settlement agreement.<sup>217</sup> After the attorney acted as mediator in a dispute he cannot represent or advice a party against another party if both parties

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<sup>210</sup> Sec. 69 Code of Practice for Attorneys.

<sup>211</sup> Ferz/Filler, Mediation, p. 162; Steinacher, AnwBI 2000, 126. For a description of attorneys' duties and liabilities when acting as mediators see Steinacher, Die Mediationsrichtlinie in AnwBI 2000, 124 et seq.

<sup>212</sup> Sec. 64 Code of Practice for Attorneys.

<sup>213</sup> Sec. 66 Code of Practice for Attorneys.

<sup>214</sup> Sec. 66 Code of Practice for Attorneys.

<sup>215</sup> Sec. 65 Code of Practice for Attorneys.

<sup>216</sup> Sec. 65 Code of Practice for Attorneys. See Manhart, Verschwiegenheitspflicht - ein Rechtsvergleich, AnwBI 2002, 616; Steinacher, Die Mediationsrichtlinie in AnwBI 2000, 128; Ferz/Filler, Mediation – Gesetzestexte und Kommentar (2003) p. 164.

<sup>217</sup> Sec. 67 Code of Practice for Attorneys.

participated in the mediation.<sup>218</sup> Attorneys who wish to act as a mediator must attend a special mediation training.<sup>219</sup>

Notaries may also act as mediators. They must consider the Notaries Act<sup>220</sup> and the Code of Practice for Notaries.<sup>221</sup> The notaries' duties are similar to the attorneys' duties.<sup>222</sup>

Non-judicial civil servants – which are not involved in the dispute according to section 16 (1) Mediation Act – may act as mediators as well. However, the civil servant's employment as a mediator may qualify as an additional activity within the meaning of section 56 Civil Servant Act<sup>223</sup>. Under this provision the civil servant must inform his department and apply for permission if he receives remuneration for acting as a mediator. For other employees that work for the State and who are not civil servants, there is an obligation to inform their respective department of all additional paid income if it is likely to exceed a period of four weeks.<sup>224</sup>

Judges may attempt amicable settlement during adversarial proceedings. They may further recommend parties to try to settle their dispute through mediation. However, a judge being actively involved in adversarial proceedings may not

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<sup>218</sup> Sec. 68 Code of Practice for Attorneys.

<sup>219</sup> Sec. 69 Code of Practice for Attorneys.

<sup>220</sup> Notaries Act (Notariatsordnung, NO) RGBI. Nr. 76/1871 last amendment BGBl. I Nr. 164/2005.

<sup>221</sup> Code of Practice for Notaries (Richtlinien der Österreichischen Notariatskammer vom 21 Oktober 1999 über das Verhalten und die Berufsausübung der Standesmitglieder - Standesrichtlinien).

<sup>222</sup> Secs. 32-39 Code of Practice for Notaries. For further information see Schoiber, Der Notar als Mediator in Kleindienst-Passweg/Wiedermann/Proksch (ed.) Handbuch Mediation (2008) register 6, sec. 3.

<sup>223</sup> Civil Servant Act (Beamten-Dienstrechtsgesetz, BDG) BGBl. Nr. 333/1979.

<sup>224</sup> Sec. 8 Public Servant Act (Vertragsbedienstetengesetz) BGBl. Nr. 86/1948 last amendment BGBl. I Nr. 96/2007.

act as mediator. The same is stipulated by article 3 of the Mediation Directive, **which** specifically encompasses mediation by a judge who is not responsible for the judicial proceedings in question. The Mediation Directive excludes judicial settlement attempts during proceedings. Therefore, a retired judge who sits occasionally but has no responsibility for judicial management of a dispute can validly act as a mediator.<sup>225</sup>

### 3.3.2 How to find a mediator

The Mediation Act aims at ensuring quality standards and introduces detailed measures for the registration of mediators and institutions offering mediation courses.<sup>226</sup> In order to ensure quality standards and access to appropriate mediators and mediation training institutions, the Ministry of Justice has maintained a list of registered mediators and training institutions since 1 January 2004.<sup>227</sup> Interested parties can find more than 3.500 registered mediators on this list.

Sections 9 to 14 of the Mediation Act describe the preconditions for registration in the list of mediators, the necessary professional qualifications, and application procedure for enrolment in the list of mediators, examination of preconditions for enrolment, the enrolment period and cancellation from the list of mediators.

### 3.3.3 Qualification

The Mediation Act provides that registration in the list of mediators – maintained by the Ministry of Justice – presupposes that the person is over 28 years old, has technical qualifications, and provides proof of trust-worthiness and appropriate liability insurance.<sup>228</sup> The parties can select any person who

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<sup>225</sup> Allen, Implementing the EU Directive on mediation (2008), available at [www.linexlegal.com](http://www.linexlegal.com).

<sup>226</sup> Secs. 8–14 and 23–28 Mediation Act.

<sup>227</sup> See [www.mediatorenliste.justiz.gv.at/mediatoren/mediatoren.nsf/docs/home](http://www.mediatorenliste.justiz.gv.at/mediatoren/mediatoren.nsf/docs/home).

<sup>228</sup> Secs. 9 (1) nos. 1–4 and 19 Mediation Act.

has full legal capacity to enter into legal transactions.<sup>229</sup> According to section 10 (1) of the Mediation Act, a mediator is technically qualified after having attended mediation training,<sup>230</sup> having gained knowledge and mediation skills, and gaining familiarity with the legal and psychological aspects of mediation.<sup>231</sup>

The age requirement is intended to ensure the mediator's maturity and life experience.<sup>232</sup> Anyone who wants to be registered on the list of mediators must prove his or her trust-worthiness. If this prerequisite for registration is not already fulfilled through a licensing requirement as is required for professional groups, such as judges,<sup>233</sup> attorneys,<sup>234</sup> notaries,<sup>235</sup> psychologists and psychotherapists,<sup>236</sup> trust-worthiness can be proven through an extract from the register of convictions, which may not be older than three months.<sup>237</sup>

A potential future mediator must submit to the Federal Minister of Justice a written application that includes documents, certificates, verifications and diplomas.<sup>238</sup> Information regarding the person's professional experience and his

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<sup>229</sup> There are no additional statutory requirements regarding the qualification of arbitrators, provided the parties have not agreed upon any special additional qualification requirements.

<sup>230</sup> Sec. 29 Mediation Act.

<sup>231</sup> For the training requirements Wiedermann/Fucik/Ferz, *Das Recht der Mediation – gesetzliche Verankerung der Mediation in Kleindienst-Passweg/Wiedermann/Proksch* (ed.) *Handbuch Mediation* (2008) register 3.

<sup>232</sup> Explanatory Notes, p. 52.

<sup>233</sup> Sec. 57 Judicial Service Act (Richterdienstgesetz, RDG).

<sup>234</sup> Arts. 5 (2) and 30 (3) Attorneys Act.

<sup>235</sup> Arts. 11 (3) no. 1 and 170a (3) Notaries Act.

<sup>236</sup> Arts. 10 no. 4 and 11 no. 4 Psychologist Act (Psychologengesetz) BGBl. Nr. 360/1990.

<sup>237</sup> Sec. 11 (2) Mediation Act.

<sup>238</sup> Sec. 11 (2) Mediation Act.

mediation training has to be presented as well.<sup>239</sup> An applicant who fulfils all preconditions<sup>240</sup> obtains a legal claim for registration. He will be registered in the list of mediators through an administrative authority procedure<sup>241</sup> for a period of five years.<sup>242</sup> The mediator can apply to renew the registration for another 10 years, respectively.<sup>243</sup>

In case any of the above preconditions cease to apply,<sup>244</sup> i.e. the mediator does not satisfy the advanced training requirements or otherwise grossly violates his duties or even after continuous warnings proceeds to violate certain commitments, the mediator will be deleted from the list.<sup>245</sup>

The Mediation Act provides detailed provisions regarding the content of mediation training. According to section 29 (2) of the Mediation Act, mediation training contains both a theoretical and a practical aspect. Altogether, it includes 300 to 500 training units. The theoretical part focuses, among other things, upon the procedure, methods and phases of mediation, education in communication skills, negotiation tactics, moderation of conflict situations, conflict analysis, areas of mediation, theories of personality and psycho-social forms of conflict intervention, ethical questions of mediation and civil law questions relating to mediation.<sup>246</sup> In the theoretical part of the mediation training, participants attend practical training through role-plays, simulation and reflection, peer group training and case law studies including supervision.<sup>247</sup>

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<sup>239</sup> Sec. 11 (3) Mediation Act.

<sup>240</sup> Sec. 9 (1) Mediation Act.

<sup>241</sup> Explanatory Notes, p. 14.

<sup>242</sup> Sec. 13 (2) Mediation Act.

<sup>243</sup> Sec. 13 (2) Mediation Act.

<sup>244</sup> Sec. 9 Mediation Act.

<sup>245</sup> Sec. 14 (1) Mediation Act.

<sup>246</sup> Sec. 29 (2) no.1 Mediation Act.

<sup>247</sup> Sec. 29 (2) no. 2 Mediation Act.



The Minister for Justice may issue further more concrete provisions as to the content of the mediation training.<sup>248</sup> In doing so, he has to consider the recommendations of the Council of Mediators.<sup>249</sup> Following this right, the Minister of Justice issues the ordinance on training in civil mediation.<sup>250</sup>

According to article 4 of the Mediation Directive, quality standards for mediators and mediation providers are dealt with by requiring Member States to ensure that voluntary codes of conduct are published and adopted, and that mediation-training standards are encouraged. Article 9 of the Mediation Directive encourages ready availability of contact information for mediators and mediation providers. The Mediation Directive does not regulate all issues relating to mediation and notably does not include provisions concerning the mediation process or the appointment or accreditation of mediators.<sup>251</sup> The Mediation Directive does neither introduce a formal registration scheme nor state which training requirements must be fulfilled in order to qualify as mediator.

### 3.3.4 Training

In the interest of quality assurance, institutions intending to offer mediation training have to file an application for registration with the Federal Minister of Justice.<sup>252</sup> The applicant institution has to submit a detailed description of the content of the training, number and qualifications of the trainers and has to prove the proper financing for the institution and training.<sup>253</sup> An applicant who fulfils all the prerequisites will be registered on the list of mediation institutions

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<sup>248</sup> Sec. 29 (1) Mediation Act.

<sup>249</sup> Sec. 29 (1) Mediation Act.

<sup>250</sup> Ordinance on Training in Civil Mediation (Zivilrechtsmediations-Ausbildungsverordnung) BGBl. II 47/2004.

<sup>251</sup> The European Code of Conduct for Mediators regulates the mediation procedure and was launched in July 2004.

<sup>252</sup> Sec. 24 (1) Mediation Act.

<sup>253</sup> Sec. 24 (1) Mediation Act.

for a period of not more than five years. A registered institution can apply for renewal of its registration for a further 10 years.<sup>254</sup> Registered mediation institutions are obliged to submit diplomas to their students after the successful completion of their training.<sup>255</sup>

Where the institution ceases to fulfil the conditions for registration, fails to achieve the training standards or submits incorrect diplomas, it has to be deleted from the list of registered institutions.<sup>256</sup>

The Mediation Directive contains rather general statements on quality assurance and generally leaves it to the Member States to assure for training and qualification measures. The Mediation Directive calls upon Member States to undertake concrete steps aimed at establishing and improving standards, including codes of conduct for mediators and organizations offering mediation services. The Directive also sees a necessity for building control and supervisory mechanisms to raise the professional level of mediation through mediation training and certification.

### 3.3.5 Number of mediators

In principle, Austrian and European law allows the parties free choice regarding the number of mediators. Panels consisting of an even number of mediators are acceptable.<sup>257</sup> The mediator can be of any nationality or gender. It must be considered, that only in case the mediator is named in the list of mediators, the provisions of the mediation act apply.

### 3.3.6 Neutrality and impartiality

Sections 15-18 Mediation Act include the mediator's duties in his relationship with the parties. As a main principle, and in order to avoid conflicts of interests,

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<sup>254</sup> Sec. 25 (1) Mediation Act.

<sup>255</sup> Sec. 26 (1) Mediation Act.

<sup>256</sup> Sec. 28 (1) Mediation Act.

<sup>257</sup> The contrary is true for arbitral tribunals. According to section 586 (1) of the Civil Procedure Code it is mandatory that the tribunal consist of an uneven number of arbitrators.

a mediator must be neutral,<sup>258</sup> meaning the mediator should not have any connection to the parties.<sup>259</sup> Another attribute the mediator must exhibit is an attitude of equality toward each of the parties.<sup>260</sup> Just like judges, the mediator has to be impartial and unbiased.<sup>261</sup> According to section 16 (1) Mediation Act, involved parties, party representatives, advisors, judges or other decision takers may not act as mediators in the relevant dispute. Likewise, a mediator may not represent advice or decide in a conflict regarding or relating to the subject matter of the mediation.<sup>262</sup> The sanctions for a violation are of administrative nature.<sup>263</sup>

### 3.3.7 Confidentiality

The Mediation Act contains general regulations pertaining to the secrecy and confidentiality of information. Accordingly, any information received during mediation or resulting from mediation is subject to confidentiality.<sup>264</sup> The duty to confidentiality applies to the mediator and his assistants. They are required to treat any facts learned or entrusted to them, and any documents prepared or received, during or in the context of mediation, as secret and confidential. In order to comply with confidentiality in the mediation procedure in the case of subsequent judicial proceedings, the Mediation Act<sup>265</sup> amended the Civil Procedure Code and the Criminal Procedure Code. A mediator cannot testify in civil proceedings with regard to the information relating to the mediation

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<sup>258</sup> Sec. 1 (1) Mediation Act.

<sup>259</sup> Explanatory Notes, p. 20.

<sup>260</sup> Explanatory Notes, p. 20.

<sup>261</sup> Sec. 57 Judicial Service Act; sec. 19 Jurisdictional Norm (Jurisdiktionsnorm, JN) RGBI. Nr. 111/1895 last amendment BGBl. I Nr. 128/2004; sec. 72 Civil Procedure Code.

<sup>262</sup> Sec. 16 (1) Mediation Act.

<sup>263</sup> Sec. 32 Mediation Act.

<sup>264</sup> Sec. 18 Mediation Act.

<sup>265</sup> Pts. III and IV Mediation Act.

procedure.<sup>266</sup> The parties cannot release the mediator from the duty to confidentiality. The mediators' duty to confidentiality has to be regarded ex officio. Article 152 (1) no. 5 of the Criminal Procedure Code leaves it up to the mediator to decide whether to testify or not. An absolute prohibition to testify in criminal proceedings does not exist. The mediator's duty to confidentiality applies also to non-contentious proceedings.<sup>267</sup>

For the mediator's liability in case of infringement of the duty to confidentiality and exceptions from the duty to confidentiality see section 3.3.11.

The regulations on confidentiality (sections 18 Mediation Act, 320 Civil Procedure Act, 152 Criminal Procedure Act and 25 Non-contentious Act) apply solely to the mediator named on the list of mediators. Other mediators must, in general, testify on issues relating to mediation in state court proceedings if a party requests so. Exceptions to testify may only result from the less strong provisions of confidentiality contained in the Trading Regulations<sup>268</sup> or from the provision regarding a person's (limited) right to deny testimony of the Civil Procedure Code.<sup>269</sup>

In principle, mediation proceedings are held in camera and are not open to the public. As stated above, with regard to the mediators, the Mediation Act provides for general regulations on confidentiality and special provisions regarding confidentiality in civil and criminal court proceedings. It is, however, unclear whether there is a general obligation to confidentiality between the parties in the absence of an agreement by the parties. Information disclosed during the mediation can be referred to and relied on in subsequent proceedings. It is therefore advisable to provide for a confidentiality obligation between the parties in the mediation agreement.

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<sup>266</sup> Sec. 320 no. 4 Civil Code.

<sup>267</sup> Sec. 35 Non-contentious Proceedings Act. Sec. 35 Non-contentious Proceedings Act generally refers to the provisions on evidence of the Civil Procedure Code, including sec. 320 Civil Procedure Code.

<sup>268</sup> Secs. 119 Trading Regulations (Gewerbeordnung, GewO) BGBl. Nr. 194/1994.

<sup>269</sup> Sec. 321 Civil Procedure Code.

According to article 7 of the Mediation Directive, Member States must ensure that mediators and providers shall not be compelled to give evidence in civil proceedings or arbitrations regarding information arising out of or in connection with a mediation process. This is subject to three exceptions: (i) the parties agree otherwise, (ii) overriding public policy considerations, such as to child protection or physical or psychological harm may request so, (iii) disclosure of the content of the agreement is necessary to implement or enforce the mediation settlement agreement. Member States can enact stricter measures to protect the confidentiality of mediation.<sup>270</sup>

### 3.3.8 Duty to act personally, inform and document

The mediator has to mediate pursuant to his best knowledge and conscience, personally, directly and neutrally. The mediator can neither substitute the mediation mandate nor delegate his function while he is impeded. According to the principle of immediacy, the mediator must be present during the course of the mediation procedure. This means that means of telecommunication including telephone and Internet are explicitly excluded.

The mediator is obliged to inform the parties to the mediation about the nature (voluntary activity involving a technically trained, neutral intermediary) and legal consequences (suspension of limitation periods, confidentiality) of mediation.<sup>271</sup>

The mediator has to suggest assistance, in particular legal assistance, to the parties where he sees an urgent need for such assistance.<sup>272</sup> The mediator does strictly not have the role of an advisor – especially a legal advisor. In order to reasonably suggest legal assistance, the mediator must have a certain legal knowledge. Furthermore, he has to inform the parties, which form the mediation settlement agreement, must have in order to be enforceable.

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<sup>270</sup> Art. 7 (2) Mediation Directive.

<sup>271</sup> Sec. 16 (2) Mediation Act.

<sup>272</sup> Sec. 16 (3) Mediation Act.

In order to prove suspension of limitation periods, the mediator has to document the start, continuation and end of the mediation.<sup>273</sup> Furthermore, the mediator must record the result of the mediation process. The mediator must store the mediation file and the documentation of the mediation at least seven years after the end of the mediation.<sup>274</sup> Upon request of the parties the mediator must hand over a copy of the mediation file.

The Mediation Directive does not contain provisions in this regard.

### 3.3.9 Resignation, challenge and replacement

According to the principle of voluntariness, the mandate of a mediator can be terminated at any stage of the proceedings by the parties, or by the resignation of the mediator. According to Austrian law, the mediator must have important reasons for such termination. The Mediation Act does not contain regulations in this regard.

Austrian and European law does not contain any regulations regarding grounds, procedure and deadlines for challenging a mediator. Based upon the principle of voluntariness a party considering a mediator to be impartial may simply end the mediation by formal statement or through non-appearance in the mediation procedure. The parties are free to agree on a procedure to challenge a mediator.

There are no provisions regarding replacement of a mediator. In principle, all parties to the mediation must agree upon the person of the mediator. However, the mediation agreement may provide for appointment of the mediator. It may be agreed that in the event the mandate of a mediator terminates, a new mediator shall be appointed according to the original rules that were applicable to the appointment of the mediator being replaced.

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<sup>273</sup> Sec. 14 (1) Mediation Act.

<sup>274</sup> Sec. 17 (3) Mediation Act.

### 3.3.10 Liability

The mandate as mediator constitutes an act based on the parties' initiative. Consequently, mediators are not considered as being public entities according to section 1 Official Liability Law.<sup>275</sup> Official Liability Law is, therefore, not applicable to mediators. Rather, a mediator is liable directly for a party's damages in case the mediator fails to fulfil its duties.<sup>276</sup>

A mediator is liable for damages if he fails to fulfil his duties. He is liable according to the provisions of tort law.<sup>277</sup> As the mediator is considered an expert in the field of mediation he is liable for negligence.<sup>278</sup> The mediator is further responsible for diligent behaviour of his assistants.<sup>279</sup> Where a breach of the provisions of sections 15 (2), 16, 17, 19, 21 and 27 of the Mediation Act is committed, the mediator is to be punished with a fine of up to € 3.500. Mediators enrolled on the list of mediators must have liability insurance.<sup>280</sup> The mediator shall conclude professional liability insurance, covering a minimum insurance of € 400.000 for each insurable matter.

The Mediation Directive does not contain regulations in this regard.

### 3.3.11 Criminal prosecution

A criminal court may condemn a mediator or a mediator's assistant if he infringes his duty to confidentiality.<sup>281</sup> A mediator who violates the obligation of

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<sup>275</sup> Official Liability Law (Amtshaftungsgesetz, AHG) BGBl. Nr. 20/1949.

<sup>276</sup> Secs. 16 and 32 Mediation Act.

<sup>277</sup> Secs. 1295 et seq. Civil Code.

<sup>278</sup> Sec. 1299 Civil Code. Feil, Zivilrechts-Mediationsgesetz in GesRZ 2003, XXI. Fitsch, Rechtsfragen des Mediationsvertrages (Teil II) – Rechtsfolgen und Sonderfragen in JAP 2000/2001, 139.

<sup>279</sup> Secs. 1313a and 1315 Civil Code.

<sup>280</sup> Sec. 19 Mediation Act.

<sup>281</sup> Secs. 18 and 31 Mediation Act.

secrecy and confidentiality<sup>282</sup> may incur criminal liability if his action harmed a legitimate interest of a person.<sup>283</sup> Prosecution is subject to the injured person's criminal action.<sup>284</sup> The statutory range of punishment amounts to a six-month prison sentence or a monetary fine of 360 daily rates. Another consequence of infringing the duty to confidentiality is the deletion of the mediator from the list of mediators.<sup>285</sup>

An exception to the duty of confidentiality applies if public or legitimate private interests justify disclosure. In such case the mediator may give testimony or disclose information.<sup>286</sup> If a mediator does not testify in such case, he may be convicted for omission of the prevention of a criminal action.<sup>287</sup> Another exception to the duty of confidentiality applies with regard to the start, continuation and end of the mediation.<sup>288</sup>

Austrian law does not provide any further criminal provisions for mediators. However, the general rules of the Criminal Code do apply to a mediator's criminal liability.

The Mediation Directive does not contain regulations in this regard.

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<sup>282</sup> Sec. 18 Mediation Act.

<sup>283</sup> Sec. 31 (1) Mediation Act.

<sup>284</sup> Sec. 31 (3) Mediation Act; sec. 2 (2) Criminal Procedure Code.

<sup>285</sup> Sec. 14 Mediation Act.

<sup>286</sup> Sec. 31 (2) Mediation Act.

<sup>287</sup> Sec. 286 Criminal Code. See also Pruckner, *Recht der Mediation* (2003) p. 48 et seq.

<sup>288</sup> Sec. 14 (1) Mediation Act.



### 3.4 The mediation agreement

#### 3.4.1 Content

Austrian law does not contain any form requirements for mediation agreements.<sup>289</sup> The mediation agreement results from concurrent declarations of intent.<sup>290</sup> Mediation agreements can be either in writing or orally.<sup>291</sup> Oral and tacit mediation agreements are valid. It is however advisable to include at least the following minimum content into a mediation clause: A mediation agreement should contain (i) the names of the parties, (ii) the subject matter of the dispute and (iii) the statement that the parties' wish to submit the respective dispute, or any dispute, arising out of their defined legal relationship to mediation. In addition, the mediation agreement may contain provisions regarding the person of the mediator, the mediator's remuneration, the mediation procedure, or include a reference to the rules of a particular mediation institution such as the VIAC, ICC or LCIA. It is also important to consider that there is a strict distinction between a mediation clause and other forms of dispute resolution such as arbitration or expert determination.

#### 3.4.2 Personal capacity

Under Austrian law any natural person that is fully capable of entering into a contract as well as legal entities and partnerships may conclude a mediation agreement, with the exception of civil law partnerships and silent partnerships according to the ABGB.

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<sup>289</sup> An exception applies with regard to aided mediation in family matters. In such cases mediation agreements must be in writing (sec. 39c Law on Equalization of the Family Burden). For discussion of legal questions relating to the mediation agreement from an Austrian perspective see Fitsch, *Rechtsfragen des Mediationsvertrages (Teil I) – Grundsätzliches und Vertragsnatur* in JAP 2000/2001, 70; Fitsch, *Rechtsfragen des Mediationsvertrages (Teil II) – Rechtsfolgen und Sonderfragen* in JAP 2000/2001, 139.

<sup>290</sup> Sec. 861 Civil Code.

<sup>291</sup> Sec. 863 Civil Code.

A party's capacity to validly conclude a mediation agreement is determined by its personal status, which is established pursuant to sections 9 and 10 of the Austrian Private International Law. According to these provisions, the status of an individual, as well as a legal entity, is determined by the *lex personalis*.<sup>292</sup> In Austria a natural person has the legal capacity to validly enter into a mediation agreement at the age of 18.<sup>293</sup>

### 3.4.3 Objective capacity

The Mediation Act applies to the mediation in civil matters.<sup>294</sup> Mediation in civil matters applies exclusively to 'all conflicts that the regular civil courts have jurisdiction to decide'.<sup>295</sup>

Any claim involving an economic interest that would lie within the jurisdiction of the civil courts, as opposed, for example, to administrative agencies, is suitable for mediation. Consequently, claims that would normally be decided by regulatory or supervisory authorities as well as, all claims, which are to be decided by the Patent Office, are not suitable for mediation.

### 3.4.4 General terms and conditions

There are no explicit provisions in the Austrian and the European models. As general terms and conditions are often used in international business contracts, it must be considered whether mediation may be agreed upon by accepting general terms and conditions. It has not yet been tested in Austrian courts whether such clause is admissible and what the consequences of non-performance are.<sup>296</sup> Since participation in mediation is entirely consensual and

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<sup>292</sup> I.e. in general the law of the state of which the individual is a citizen or the law of the state where the actual management of the legal entity resides.

<sup>293</sup> Sec. 21 (2) Civil Code.

<sup>294</sup> Sec. 3 (1) no. 1 Mediation Act.

<sup>295</sup> Sec. 1 (2) Mediation Act.

<sup>296</sup> The same applies for Germany. See Bühring-Uhle/Scherer/Kirchhoff, *Arbitration and Mediation In International Business*<sup>2</sup> (2006) p. 229.

refusal to engage in the process is not subject to any sanctions in Austria, it may be expected, that mediation clauses in general terms and conditions are generally admissible. In any case, sections 864 (a) and 879 (3) of the Civil Code must be considered: A mediation clause contained in general terms and conditions is not considered part of the contract if it is (i) disadvantageous to the other party and if (ii) the overall circumstances do not justify inclusion into the underlying contract between the parties.<sup>297</sup>

### 3.4.5 Separability

Neither the Mediation Act nor the Mediation Directive explicitly adopts the doctrine of separability of mediation agreements. An arbitration clause contained in a contract is treated as a separate agreement that is independent from the other terms of the contract. Thus, the validity of an arbitration agreement is generally independent from the validity of the underlying contract. The same may – of course pursuant to the principle of voluntariness – be applied for mediation agreements.

## 3.5 Mediation and state courts

### 3.5.1 Assistance by state courts

Neither the Mediation Act nor the Civil Procedure Code provide for court assistance in mediation e.g. in regard to the attachment of assets, taking of evidence.<sup>298</sup> Neither a party nor the mediator can ask for court assistance. The same applies to the Mediation Directive.

### 3.5.2 Mediation during state court proceedings

If parties decide during state court proceedings to refer their dispute to mediation they may (i) file a request for time extension<sup>299</sup> or (ii) agree on

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<sup>297</sup> Secs. 864 (a) and 879 (3) Civil Code.

<sup>298</sup> According to sec. 589 of the Civil Procedure Code state courts are obliged to grant judicial assistance to arbitral tribunals.

<sup>299</sup> Secs. 128 and 134 Civil Procedure Code.

suspension of the proceedings.<sup>300</sup> Once the parties have informed the court that they have agreed to suspend the proceedings they can only be initiated after a time period of three month has elapsed.<sup>301</sup>

During the course of the oral hearing a judge may aim at achieving an amicable settlement of the dispute between the parties. The judge may hold amicable settlement discussions with the parties. In case these amicable settlement discussions fail, the judge will render a decision. If the judge considers is useful, he must inform the parties about institutions providing services in the field of amicable settlement.<sup>302</sup>

### 3.5.3 Suspension of limitation periods

The pertinent provision of the Mediation Act provides for suspension of limitation periods for claims related to the mediation procedure.<sup>303</sup> The suspension starts at the point in time when mediation has been initiated and continued properly until the end of the mediation procedure.<sup>304</sup> The beginning of mediation is determined through the parties' agreement to find a solution to their conflict through mediation.<sup>305</sup> Mediation ends if either one of the parties or the mediator announces its unwillingness to proceed or the parties agree to settle their dispute.<sup>306</sup> The mediator has a duty to record beginning and end of the mediation procedure. The suspension applies to time bar and preclusion

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<sup>300</sup> Secs. 168-170 Civil Procedure Code.

<sup>301</sup> Sec. 168 Civil Procedure Code.

<sup>302</sup> Sec. 204 (1) Civil Procedure Code.

<sup>303</sup> Sec. 22 Mediation Act.

<sup>304</sup> Sec. 22 (1) Mediation Act. See also sec. 99 Martimony Law (Ehegesetz, EheG); Art XVI Amendment to the Law of Parent and Child. The parties can, moreover, agree to a stay of state court proceedings according sec. 168 et seq. Civil Procedure Code.

<sup>305</sup> Sec. 17 (1) Mediation Act.

<sup>306</sup> Sec. 17 (1) Mediation Act.

periods.<sup>307</sup> It does not apply to procedural time periods.<sup>308</sup> Suspension occurs only with regard to the legal relationship between the parties. Suspension does not apply to third parties' rights. The parties, however, may agree in writing to suspend a limitation or any other time periods, including those pertaining to other claims between them that are not subject to mediation.<sup>309</sup> A privileged regulation applies to mediation in family matters. Section 22 (1) of the Mediation Act provides that the suspension of time periods applies to all mutually existing rights and claims of a family law nature between the parties. The parties can restrict or exclude this extension of the suspension of time limits through a written agreement.<sup>310</sup>

Limitation periods are interrupted only in case the mediator is named on the list of mediators maintained by the Ministry of Justice. Whether mediation is conducted ad hoc or on an institutional level does not have any influence upon the running of limitation periods as long as the mediator is named on the list of mediators. Parties must be advised that mediation proceedings conducted by a mediator not enrolled in the list do not interrupt the running of the period of limitations.

Article 8 of the Mediation Directive requires Member States to ensure that parties to a mediation process cannot be prevented from initiating judicial or arbitration proceedings by the expiry of a limitation period during the mediation process.

### 3.6 Costs of the mediation

#### 3.6.1 Advance and reimbursement of cost

The Mediation Act does not contain any provision as to the advance and reimbursement of costs in mediation proceedings. Guidance may be found in

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<sup>307</sup> For example warranty or damage claims.

<sup>308</sup> See also sec. 128 Civil Procedure Code.

<sup>309</sup> Sec. 22 (2) Mediation Act.

<sup>310</sup> Sec. 22 (2) Mediation Act.

institutional mediation rules. Guidance can further be found in sections 1170, 1014 ABGB according to which - in an analogous application of the cost determination provisions for state court proceedings - the mediator has the right to receive advanced payment of the mediation fees.<sup>311</sup> In analogy to sections 365 and 332 (2) Civil Procedure Code, the mediator can refrain from commencing to work until the parties provide the advance on costs.<sup>312</sup> The mediator cannot decide on the obligation for the reimbursement of costs.

### 3.6.2 Mediator's fees and expenses

There are no general statutory provisions regulating fees and expenses of mediators. The amount of compensation can be determined in the mediation agreement. The amount has to be adequate.<sup>313</sup>

The fee claim is a claim under private law. The mediator's claim for compensation may be based on sections 1151 (1) and 1152 of the Civil Code. State courts can review the adequateness of the fee claim. In case the parties have determined the fees in the mediation agreement or in a separate agreement, the court can only review the determination of the fees if the agreement itself is ineffective (e.g. section 879 Civil Code).

The Mediation Directive does not contain provisions in this regard.

### 3.6.3 Party's and attorney's fees and expenses

Austrian law and the Mediation Directive are silent in the matter of reimbursement of attorneys' and parties' fees and expenses in mediation.<sup>314</sup>

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<sup>311</sup> The same principle applies to arbitration proceedings. See Fasching, *Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht* (1973) p. 75 et seq.

<sup>312</sup> The same principle applies to arbitration proceedings. See Fasching, *Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht* (1973) p. 76.

<sup>313</sup> Sec. 1152 Civil Code.

<sup>314</sup> As a general rule in litigation and arbitration proceedings, the losing party is ordered to pay the total amount of the arbitrator's fees and the cost of the arbitration, including reasonable expenses for legal representation. With regard to arbitration, section 608 (1) of the Civil

Reimbursement of attorneys' and parties' fees is subject to the agreement by the parties. In general every party will bear its own cost, including attorneys' fees.

#### 3.6.4 Tax and VAT

Mediator's fees are subject to income tax if the place of mediation or the normal residence or place of business of the mediator is located in Austria.<sup>315</sup>

Mediator's fees are submitted to VAT if the place of mediation or the mediator's general residence is located in Austria.

### 3.7 The mediation settlement agreement

#### 3.7.1 Drafting the mediation settlement agreement

A mediator whose profession is a lawyer or notary can assist the parties in drafting the mediation settlement agreement subject to all parties' consent and express wish.<sup>316</sup> Such mediation settlement agreement may be in the form of a notary act or an out of court settlement. Mediators without this professional authority cannot draft the mediation settlement agreement.<sup>317</sup> Upon request of the parties the mediator must provide the parties with a written document including the result and the further steps to be taken.<sup>318</sup> This document does however not have any legal effects. In order to enforce a mediation settlement agreement it must be included in a court settlement or a notary's act or arbitral award on consent.

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Procedure Code states that the arbitral tribunal shall decide upon the obligation to reimburse the costs of the proceedings provided that the parties have not agreed otherwise.

<sup>315</sup> For the procedure with the financial authorities see Pruckner, *Recht der Mediation* (2003) p. 61 et seq.

<sup>316</sup> Sec. 16 (1) Mediation Act.

<sup>317</sup> Ferz/Filler, *Mediation – Gesetzestexte und Kommentar* (2003) p. 51.

<sup>318</sup> Sec. 17 (2) Mediation Act. See also Ferz/Filler, *Mediation – Gesetzestexte und Kommentar* (2003) p. 53.

### 3.7.2 Form

The Mediation Act is silent with regard to the form, nature and enforcement of the mediation settlement agreement.<sup>319</sup>

A mediation settlement agreement may be included in different legal instruments. It may be (i) an amicable settlement or private law contract, either in writing or oral form, (ii) an out of court settlement (iii) enforceable notaries act, (iv) arbitral award on agreed terms or (v) an enforceable court settlement.<sup>320</sup> For comments on the Mediation Directive see section 3.7.3 below.

### 3.7.3 Enforcement

While the Mediation Act does not deal with form and enforcement of mediation settlement agreements the Mediation Directive provides some guidance. Article 6 of the Mediation Directive deals with the enforcement of mediation settlement agreements - recognising that parties will not regard mediation, as being a viable alternative to litigation if any settlement reached cannot easily be enforced in the same way that a judgment is.<sup>321</sup> Article 6 of the Mediation Directive requires that it should be possible for a settlement agreement negotiated at mediation to be enforceable by a court, unless it is illegal according to the law of the Member State where enforcement is sought. The content of the agreement may be made enforceable by a court or other

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<sup>319</sup> As stated under section 3.7.1 above, only a mediator whose profession is a lawyer or notary can assist the parties in drafting the mediation settlement agreement. Mediators without professional authority can not draft the mediation settlement agreement but must - upon request of the parties - provide the parties with a written document including the result of the mediation and the further steps to be taken.

<sup>320</sup> For comments regarding form and enforcement of mediation settlement agreement under German law see Eidenmüller, Vertrags- und Verfahrensrecht der Wirtschaftsmediation: Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle (2001) p. 43 et seq.

<sup>321</sup> Norton Rose LLP, The European Mediation Directive: What does it mean for you? (2008), available at [www.linexlegal.com](http://www.linexlegal.com).



competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.<sup>322</sup> This provision applies to written settlement agreements only.

It seems that the Austrian system complies with this requirement already.<sup>323</sup> Even though in practice there are ways of rendering mediation settlement agreements enforceable by means of a notaries act or an award on agreed terms, statutory clarification may well avoid the difficulties regarding enforcement of mediation settlement agreements.

Furthermore it may be regarded whether to provide for a mechanism to make mediation settlement agreements enforceable per se. Lenz in this regard made an interesting proposal.<sup>324</sup> Lenz, who proposes a Draft Civil-Mediation-Act for Germany, introduces a provision declaring mediation settlement agreements enforceable if they were made under the guidance of a mediation center.<sup>325</sup> A mediation center may be opened if at least one registered mediator who is an attorney or notary at the same time is employed.<sup>326</sup> According to Lenz's proposal, a mediation center has the competence to issue an enforcement clause, which grants direct enforcement of mediation settlement agreements.<sup>327</sup> Indeed, the possibility of foreclosure of mediation settlement agreements concluded at a mediation center may improve trust and confidence in

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<sup>322</sup> Art. 6 (2) Mediation Directive.

<sup>323</sup> The same may apply to France. The French Civil Code provides that settlement agreements which put an end to a dispute are *res judicata* between the parties. Furthermore, settlement agreements can be given the same strength as judgments issued by a Court of law through *ex parte* proceedings before the French Civil Court.

<sup>324</sup> Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 212.

<sup>325</sup> Sec. 12 Draft Civil-Mediation-Act for Germany. Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 212.

<sup>326</sup> Sec. 15 (3) Draft Civil-Mediation-Act for Germany. Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 212.

<sup>327</sup> Sec. 12 Draft Civil-Mediation-Act for Germany. Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008) p. 212.

mediation. Truly, a mechanism as proposed by Lenz may bear the potential to make mediation to a proper alternative to judicial or arbitral proceedings. Only where compliance with mediation settlement agreements does not entirely depend upon the good will of the parties and requests some further time and money during exequatur or arbitration proceedings there may be equal ranking between mediation, court proceedings and arbitration.

#### **3.7.3.1 Amicable settlement or private law contract**

A mediation settlement agreement contained a private law contract is not enforceable *per se*.<sup>328</sup> This is often considered being a drawback of mediation.<sup>329</sup> Specific performance may be stipulated but not guaranteed, and a settlement agreement will be construed by a national court or arbitral tribunal just like any other contract.<sup>330</sup> Failing performance parties would have to initiate court proceedings regarding the breach of the mediation settlement agreement. This would prolong the dispute settlement process and cause cost and legal risks. In cross border disputes, special attention must be given on how to enforce mediation settlement agreements. Claimant needs to initiate court proceedings in the breaching party's country. Commencing a lawsuit in foreign jurisdictions may bear risks, cost and uncertainties. In order to avoid commencing legal proceedings in foreign jurisdictions the parties could include a personal jurisdiction clause regarding disputes relating to the mediation settlement agreement into a mediation clause (or the mediation settlement agreement).<sup>331</sup> As per an alternative, parties can add a clause making any

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<sup>328</sup> Dendorfer/Lack, *The Interaction Between Arbitration and Mediation: Vision v Reality in SchiedsVZ 2007*, p. 195 et seq.; Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 468.

<sup>329</sup> Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 471.

<sup>330</sup> Dendorfer/Lack, *The Interaction Between Arbitration and Mediation: Vision v Reality in SchiedsVZ 2007*, p. 195 et seq.

<sup>331</sup> Abramson, *International Mediation Basics in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II.1.23.

dispute regarding the mediation settlement subject to the jurisdiction of an arbitral tribunal.<sup>332</sup>

In general mediation settlement agreements may be challenged in court just as any contract can be challenged. If a party misdirects the other party on essential issues the other party may claim damages and challenge the mediation settlement agreement by reason of error.<sup>333</sup>

### 3.7.3.2 Notaries act

A public notary may record enforceability of mediation settlement agreements.<sup>334</sup> Notary's acts may be directly enforced nationally without need for prior exequatur proceedings.

Notary's acts can also be enforced within the European Union. According to article 57 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters<sup>335</sup> "a document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq." The court shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.<sup>336</sup>

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<sup>332</sup> Abramson, *International Mediation Basics* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II.1.23.

<sup>333</sup> Sec. 871 Civil Code. See further secs. 872 and 874 Civil Code.

<sup>334</sup> Art. 3 Notaries Act; art. 1, no. 17 Enforcement Act (Exekutionsordnung, EO) RGBI. Nr. 79/1896 last amendment BGBl. I Nr. 68/2005.

<sup>335</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I Regulation") (2001) Official Journal L12/1.

<sup>336</sup> Art. 57 Brussels I Regulation.

### 3.7.3.3 Award on agreed terms

If the parties have settled a dispute through mediation while arbitration proceedings were pending, the parties may request that the arbitral tribunal draws up a record of the mediation settlement provided that the contents of the settlement are not in conflict with public policy.<sup>337</sup> Such award on agreed terms has the same effect as an award on the merits. According to article 1 (16) of the Enforcement Act, such a settlement is an enforceable title in Austria and in several countries with which Austria has concluded bilateral enforcement treaties. According to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>338</sup> a foreign award on agreed terms is not only enforceable in Austria but also internationally. Currently 142 states have ratified the New York Convention.

The Enforcement Act differentiates between domestic and foreign enforceable titles. An award is regarded domestic, if the place of arbitration is within Austria. While domestic awards do not require leave for enforcement, foreign awards request such procedure. Sections 79-86 of the Enforcement Act regulate recognition and enforcement of a mediation settlement agreement contained in a foreign arbitral award on agreed terms in Austria. The competent court for applications on leave for enforcement is the district court where the respondent has its seat or domicile or the competent district court for the place where the object of enforcement is placed.<sup>339</sup> Respondent may file an appeal against the decision granting enforcement within one month after the decision has been

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<sup>337</sup> See art. 30 (1) UNCITRAL Model Law on International Commercial Arbitration; Arts. 605 (1) and 606 Civil Procedure Code. See Liebscher, Austria in Liebscher (ed.) *Arbitration Law and Practice in Central and Eastern Europe*, sec. 6.14; Liebscher/Schmid, Austria in Weigand (ed.) *Practitioners Handbook on International Commercial Arbitration* (2002) p. 578.

<sup>338</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") of 10 June 1958, UN Doc. E/Conf. 26/8 Rev. 1, BGBl. 1961/2000. The text and status of the New York Convention is available at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>339</sup> Secs. 18, 19 and 82 Enforcement Act.

served.<sup>340</sup> If respondent has its place of business outside of Austria the time limit for the appeal extends to two months. If the court has dismissed the application for enforcement, the applicant may file an appeal within one month.<sup>341</sup> The application for recognition and enforcement of an arbitral award may be filed at any time after the award has become final and binding upon the parties. There is no time limit. In accordance with section 54 (2) of the Enforcement Act, the application for granting the enforcement on the basis of a foreign award must include an official copy of the enforceable award, the confirmation that the award is final, binding and enforceable and the leave for enforcement. According to section 84a (1) of the Enforcement Act, the application for recognition and enforcement and the application for leave for enforcement may be combined in one document.<sup>342</sup> To the extent that international treaties contain different provisions on recognition and enforcement the Enforcement Act does not apply.<sup>343</sup>

Indeed, there are some uncertainties as to whether drawing up an arbitral award including a mediation settlement agreement is admissible in national and international law practice. As a starting point it must be considered when arbitration is initiated. There seems to be common understanding that arbitral awards on agreed terms may be rendered and are enforceable when the parties settle the dispute amicably after arbitration was initiated.<sup>344</sup> The situation is somewhat different in cases where parties initiate arbitration proceedings for the sole purpose of including their mediation settlement agreement into an arbitral award on agreed terms. Strictly speaking, in most jurisdictions an arbitrator is only able to render an arbitral award on consent if he is appointed

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<sup>340</sup> Sec. 84 (2) Enforcement Act.

<sup>341</sup> Sec. 84 (3) Enforcement Act.

<sup>342</sup> OGH 29.5.1996, ZfR V 1996/73.

<sup>343</sup> Sec. 86 Enforcement Act.

<sup>344</sup> Sec. 1053 German Civil Procedure Code; art. 30 (1) UNCITRAL Model Law on Commercial Arbitration. See also Abramson, International Mediation Basics in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 1, § 1.04 (7).

before the dispute is settled.<sup>345</sup> Where the dispute is already settled before arbitration is initiated there may be no valid arbitration agreement according to the applicable arbitration law.<sup>346</sup> Some jurisdictions might consider initiation of arbitration proceedings for the sole purpose of securing an award on agreed terms being sham arbitration proceedings that are contrary to public policy.<sup>347</sup> Recognition and enforcement of the award on agreed terms may be refused.<sup>348</sup> There are however some jurisdictions, including Hungary and Korea, that allow parties who have settled a dispute through mediation to appoint an arbitrator specifically to issue an award based on a settlement agreement of the parties.<sup>349</sup>

According to Austrian Law, an arbitral award on agreed terms has the status of a final and binding last instance judgment of a civil court. It follows that an

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<sup>345</sup> Newmark/Hill, ADR and International Arbitration: An Evolving Relationship in Berkeley/Mimms (ed.) *International Commercial Arbitration – Practical Perspectives* (2001) p. 146. See also Mustill/Boyd, *Commercial Arbitration*<sup>2</sup> (1989) p. 46 et seq.; Heß/Sharma, *Rechtsgrundlagen der Mediation in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 26 mn 68.; Lörcher, *Durchsetzbarkeit von Mediationsergebnissen in Haft/Schlieffen* (ed.) *Handbuch Mediation* (2002) § 28 mn 30 et seq.

<sup>346</sup> See Newmark/Hill, ADR and International Arbitration: An Evolving Relationship in Berkeley/Mimms (ed.) *International Commercial Arbitration – Practical Perspectives* (2001) p. 146; Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*<sup>2</sup> (2005) p. 346.

<sup>347</sup> See Abramson, *International Mediation Basics* in Rhoades/Kolkey/Chernik (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II.1-23. See also Eidenmüller, *Vertrags- und Verfahrensrecht der Wirtschaftsmediation: Mediationsvereinbarungen, Mediatorverträge, Mediationsvergleiche, Internationale Mediationsfälle* (2001) p. 48 et seq.; Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>3</sup> (2005) p. 62; Newmark/Hill, *Can a Mediated Settlement Become an Enforceable Arbitration Award?* in *Arbitration International* Vol. 16 No. 1 (2000) p. 81.

<sup>348</sup> Art. V (1) (a) New York Convention. See further Newmark/Hill, ADR and International Arbitration: An Evolving Relationship in Berkeley/Mimms (ed.) *International Commercial Arbitration – Practical Perspectives* (2001) p. 146.

<sup>349</sup> Sec. 90 Guide to Enactment to the UNCITRAL Model Law on Commercial Conciliation.

appeal to a court on the merits of the award is not possible.<sup>350</sup> Arbitral awards may be set aside according to the grounds listed in section 611 of the Civil Procedure Code, including amongst other grounds the lack of an arbitration agreement, the violation of the right to be heard or public policy and *ultra petita* (the arbitral award exceeds the relief sought).<sup>351</sup>

### 3.7.3.4 Court settlement

If the parties to a state court proceeding settle their dispute amicably – e.g. through mediation – the court may record their settlement agreement in the form of an enforceable court settlement according to section 204 of the Civil Procedure Code and article 58 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.<sup>352</sup> According to the Brussels I Regulation, “a settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments.”<sup>353</sup> Then, “the court or competent authority of a Member State where a court settlement was approved shall issue, at the request of any interested party, a certificate”.<sup>354</sup>

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<sup>350</sup> Melis, Austria in International Handbook on Commercial Arbitration, Supplement 50 (October 2007) sec. Austria, p. 30.

<sup>351</sup> For a further description of the grounds for setting aside arbitral awards see Liebscher/Schmid, Austria in Weigand (ed.) Practitioners Handbook on International Commercial Arbitration (2002) p. 580 et seq.

<sup>352</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2001) Official Journal L12/1 (hereinafter “Brussels I Regulation”).

<sup>353</sup> Art. 58 Brussels I Regulation.

<sup>354</sup> Art. 58 Brussels I Regulation.

Contrary to the Brussels I Regulation<sup>355</sup>, enforcement under Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 Creating a European Enforcement Order for Uncontested Claims<sup>356</sup> happens without the need for any intermediate proceedings in the state of enforcement. The Brussels IIbis Regulation<sup>357</sup> includes some exceptions concerning the recognition and enforcement of judgments in matrimonial matters and matters involving parental responsibility.

Where the parties have not initiated court proceedings they may also ask the court to record their settlement agreement in the form of an enforceable court settlement.<sup>358</sup> The task of the judge is to evaluate whether the settlement agreement contains provisions, which cannot be made subject to an amicable settlement. Such court settlement has the same effect as a settlement agreement entered into during court proceedings and may be directly enforced.

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<sup>355</sup> Arts. 57 and 38 et seq. Brussels I Regulation.

<sup>356</sup> Arts 3, para. 1 lit. a and d, 24 and 25 Council Regulation (EC) No. 805/2004 of 21 April 2004 of the European Parliament and of the Council creating a European enforcement order for uncontested claims (2004) Official Journal L 143/15.

<sup>357</sup> Sec. 22 Preamble Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) 1347/2000 (2000) Official Journal L 338/1.

<sup>358</sup> Sec. 433 Civil Procedure Code. See also Lenz, *Mediation und ihre gesetzliche Verankerung in Deutschland* (2008).



## **4. Institutional rules on mediation**

### **4.1 Overview of selected mediation institutions**

#### **4.1.1 General**

The list of institutions offering alternative dispute settlement services, including mediation, is continuously growing. Institutions can be found all over the world and have done an enormous amount of work to take the theory and practice of mediation out into the world of dispute settlement. The institutional rules dealt with in detail in this paper include the rules of UNCITRAL, ICC, LCIA, SCCAM, VIAC, CEDR and MEDAL.<sup>359</sup> Although all Institutions are based in a national jurisdiction they are thoroughly of an international character, providing efficient, flexible and impartial assistance in dispute resolution proceedings for all parties, regardless of their location, and under any system of law. Parties may have complete confidence in its international credentials and in its impartiality. Some Institutions provide an extensive administration service (ICC, LICA, SCCAM, VIAC and CEDR). Others provide the rules only without being involved in the settlement of individual cases (UNCITRAL and MEDAL). The goal of the Institutions and their rules is to render a service to users of alternative dispute resolution, mainly arbitration and mediation, to help the parties through the process. The institutional mediation rules are of universal character, meaning that they can be used in any country under all laws and procedures applicable to that legal system. The structure and style of the rules is to provide a general framework for mediation proceedings open to be fashioned according to the needs of the parties in every individual case. Parties may incorporate the

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<sup>359</sup> UNCITRAL, ICC, LCIA, SCCAM, VIAC, CEDR and MEDAL together hereinafter "Institutions". Further institutions offering mediation services and mediation rules within Europe include the German Institution for Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit, hereinafter "DIS") <http://www.dis-arb.de>, the Centre de Médiation et d' Arbitrage de Paris (Centre for Mediation and Arbitration of Paris, hereinafter "CMAP") [www.cmap.fr](http://www.cmap.fr) and the European Court of Arbitration. See <http://cour-europe-arbitrage.org/>. Rubino-Sammartano, The European Court of Arbitration and its Arbitration and Mediation Rules in *Journal of International Arbitration*, Vol. 15 No. 1 (1998) p. 75 et seq.

institutional rules into their business contracts. Basically, institutional rules provide relatively little procedural detail in order to accord parties the greatest possible freedom to determine the conduct of the proceedings. Institutions guide parties when they choose the arbitrator or the mediator and monitor the duration and the cost of the proceedings. As the parties' freedom to appoint the mediator is a distinctive feature of mediation, parties are free to select their mediator. Therefore, the Institutions often have access to a large number of experienced and highly qualified mediators from many jurisdictions or maintain lists of mediators resembling their specific qualifications. While the institutional rules have many similarities, they also differ in significant ways. These differences illustrate the approach of each Institution and provide useful points of comparison. Parties should before selecting the Institution fully evaluate these differences. Therefore, this paper describes the above mentioned institutional rules. It focuses on 14 key issues relevant for all international mediation proceedings under the relevant institutional rules. Among these 14 issues this paper describes the special features of the respective institutional rules, the rule of the institution and several other issues.

While this paper deals in detail with eight institutions located within Europe, some important providers located in North America, Latin America, Asia and Australia shall be briefly mentioned here.<sup>360</sup> The most important institutions dealing with mediation in the United States include amongst others the American Arbitration Association and CPR International Institute for Conflict Prevention and Resolution.<sup>361</sup> To help parties pursue dispute resolution in an international setting, the AAA has established the International Centre for Dispute Resolution (ICDR). The Centre is charged with the exclusive administration of all of the AAA's international matters. One of Canada's leading institutions is the British Columbia International Commercial Arbitration

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<sup>360</sup> For a brief discussion of some of these institutional rules see Shane/Hassan, *Initiating and International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.

<sup>361</sup> American Arbitration Association, New York, United States of America - AAA - (<http://www.adr.org>) and CPR International Institute for Conflict Prevention and Resolution, New York, United States of America - CPR - (<http://www.cpradr.org>).

Centre.<sup>362</sup> The Mexico City National Chamber of Commerce is the most prominent mediation provider in Mexico.<sup>363</sup> The four leading arbitration institutions of the NAFTA countries have created the Commercial Arbitration and Mediation Center for the Americas.<sup>364</sup> In Chile, the Santiago Chamber of Commerce Arbitration and Mediation Center offers rules on mediation and conciliation.<sup>365</sup> The Kuala Lumpur Regional Centre for Arbitration offers Rules for conciliation and mediation based upon the provisions of the UNCITRAL Conciliation Rules.<sup>366</sup> The Hong Kong International Arbitral Centre offers mediation schemes for different fields of disputes, including commercial and construction disputes.<sup>367</sup> The Australian Centre for International Commercial Arbitration offers mediation rules and clauses as well.<sup>368</sup>

Institutional rules may gain importance in the world of business dispute settlement and may even come to the prominence of the rules on international arbitration.<sup>369</sup>

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<sup>362</sup> British Columbia International Commercial Arbitration Centre, Vancouver, B.C., Canada – BCICAC (<http://www.bcicac.com>).

<sup>363</sup> Mexico City National Chamber of Commerce, Mexico City, Mexico, offers mediation rules, available at <http://www.arbitrajecanaco.com.mx/043-canacorgtomeding.htm>.

<sup>364</sup> Commercial Arbitration and Mediation Center for the Americas – CAMCA. See Hoellering, Commercial Arbitration and Mediation Center for the Americas in *Journal of International Arbitration*, Vol. 13 No. 2 (1996) p. 117 et seq.

<sup>365</sup> Santiago Chamber of Commerce Arbitration and Mediation Center, Chile – CAM Santiago – (<http://www.camsantiago.com/en/index.htm>).

<sup>366</sup> Kuala Lumpur Regional Centre for Arbitration (<http://www.rcakl.org.my>).

<sup>367</sup> The Hong Kong International Arbitral Centre - HKIAC - (<http://www.hkiac.org/>). Baker/Ali, A cross-comparison of institutional mediation rules in *Dispute Resolution Journal* (2002) available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_/ai\\_n9060837](http://findarticles.com/p/articles/mi_qa3923/is_/ai_n9060837).

<sup>368</sup> The Australian Centre for International Commercial Arbitration – ACICA – (<http://www.acica.org.au>).

<sup>369</sup> With regard to the ICC rules see Steinacher, *Anwaltliches Berufsbild und Mediation in AnwBl* 2003, 129.

The mediation procedures may be used by parties who are already committed to mediate, by virtue of contractual dispute resolution provisions, and by parties who have not provided for mediation, but who wish to mediate their dispute, either in an attempt to avoid, or during the course of, litigation or arbitration. Many major international businesses entrust their disputes to institutions. Many cases are technically and legally complex and sums in issue can run into € billions. Parties come from a very large number of jurisdictions, of both civil law and common law traditions. The subject matter of contracts in dispute is wide and varied, and includes all aspects of international commerce, including telecommunications, insurance, oil and gas exploration, construction, shipping, aviation, pharmaceuticals, shareholders agreements, IT, finance and banking.

#### 4.1.2 UNCITRAL

The United Nations Commission on International Trade Law was established by the General Assembly in 1966 and has since come to be the core legal body of the United Nations system in the field of international trade law.<sup>370</sup> UNCITRAL is composed of sixty member states elected by the General Assembly. UNCITRAL's general mandate is to further the progressive harmonization and unification of the law of international trade. UNCITRAL's main tasks include preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field.<sup>371</sup> UNCITRAL's work is organized and conducted at three levels. The first level is UNCITRAL itself, often referred to as the Commission, which holds an annual plenary session. The second level is the intergovernmental Working Groups, which to a large extent undertake the development of the topics on UNCITRAL's work programme, while the third is the Secretariat, which assists the Commission

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<sup>370</sup> United Nations Commission on International Trade Law (hereinafter "UNCITRAL"). For further information in UNCITRAL see <http://www.uncitral.org/>.

<sup>371</sup> See General Assembly resolution 2205 (XXI), sec. II, para. 8.

and its Working Groups in the preparation and conduct of their work.<sup>372</sup> The UNCITRAL Secretariat is based in Vienna.

#### 4.1.3 ICC

The International Chamber of Commerce was founded in 1919 with an overriding aim to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital.<sup>373</sup> The ICC is essentially a federal institution: a quasi-international organization with its seat in Paris.<sup>374</sup> The ICC defines itself as "the voice of world business championing the global economy as a force for economic growth, job creation and prosperity."<sup>375</sup> It has direct access to national governments all over the world through its national committees and provides business input to the United Nations (UN), the World Trade Organization (WTO), and many other intergovernmental bodies, both international and regional.

The ICC activities cover a broad spectrum of dispute resolution techniques including arbitration and amicable dispute settlement. The ICC Arbitration Rules together with the ICC ADR Rules, the ICC Rules for Expertise, the ICC Rules for Pre-Arbitral Referee Procedure and the ICC Rules for Documentary Credit Dispute Resolution Expertise provide the framework for ICC's comprehensive array of dispute resolution services. The ICC's Court of Arbitration's task is to supervise and administer arbitration proceedings. ICC's rules and standards can be adopted voluntarily and can be incorporated in binding contracts.

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<sup>372</sup> See United Nations, The UNCITRAL Guide – Basic Facts About the United Nations Commission on International Trade Law, United Nations Publication No. E.07.V.12, p. 3 et seq.

<sup>373</sup> International Chamber of Commerce (hereinafter "ICC"). For further historical and organizational information of the ICC see <http://www.iccwbo.org/id93/index.html>. See also Craig, The LCIA and the ICC Rules: The 1998 Revisions Compared in Berkeley/Mimms (ed.) International Commercial Arbitration – Practical Perspectives (2001) p. 79 et seq.

<sup>374</sup> Craig, The LCIA and the ICC Rules: The 1998 Revisions Compared in Berkeley/Mimms (ed.) International Commercial Arbitration – Practical Perspectives (2001) p. 79.

<sup>375</sup> <http://www.iccwbo.org/id93/index.html>.

ICC organises and hosts the International Commercial Mediation Competition, dedicated to giving students an opportunity to test their problem-solving skills in a moot international mediation.<sup>376</sup> The fourth edition of the competition will take place in Paris on 7-12 February 2009.

#### 4.1.4 LCIA

The London Court of International Arbitration's roots date back to 1891.<sup>377</sup> The LCIA is a not-for-profit company limited by guarantee. It is a legal entity with participation of the Chartered Institute of Arbitrators, the Corporation of the City of London and the London Chamber of Commerce and Industry that sees itself as a truly international organisation.<sup>378</sup> As at February 2005, the LCIA had more than 1.500 members from 79 countries, including commercial and trading organisations, international lawyers and firms of lawyers, practising international arbitrators and others. The LCIA operates under a three-tier structure, comprising the Company, the Arbitration Court and the Secretariat. The LCIA Court is the final authority for the proper application of the LCIA Rules. Its key functions are appointing tribunals, determining challenges to arbitrators, and controlling costs. The LCIA provides an extensive administration service, including the conduct of arbitration and ADR under its

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<sup>376</sup> <http://www.iccwbo.org/court/adr/id24376/index.html>. In 2007, 20 legal teams from 14 countries participated in the competition. See International Chamber of Commerce, ICC in 2008 – Achievements, goals and leadership, ICC Publication No. 845.

<sup>377</sup> The London Court of International Arbitration (hereinafter "LCIA"). The initial name of the LCIA was "The City of London Chamber of Arbitration". In April 1903, the tribunal was re-named the "London Court of Arbitration". In 1981, the name of the court was changed to "The London Court of International Arbitration". For further historical and general information on the LCIA see <http://www.lcia-arbitration.com/>. See also Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 511; Winstanley, *The LCIA – History, Constitution and Rules* in Berkeley/Mimms (ed.) *International Commercial Arbitration – Practical perspectives* (2001) p. 21 et seq.; Craig, *The LCIA and the ICC Rules: The 1998 Revisions Compared* in Berkeley/Mimms (ed.) *International Commercial Arbitration – Practical Perspectives* (2001) p. 79 et seq.

<sup>378</sup> Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 511.

own rules<sup>379</sup> and procedures and acting as appointing authority and administrator in UNCITRAL rules cases. The LCIA's dispute resolution services are available to all contracting parties, without any membership requirements. The LCIA also offers a general membership, organised into Users' Councils (the European-, Arab-, North American-, Latin-American and Caribbean-, Asia-Pacific- and the African Users' Council), for which it organises a worldwide programme of conferences, seminars and other events of interest to the arbitration and ADR community. Membership is open to all interested persons. Members receive the LCIA's quarterly journal "Arbitration International", which is recognised as one of the leading scholarly journals on the development and application of international commercial arbitration. Members also receive the LCIA's informative newsletter.

#### 4.1.5 SCCAM

Relatively new on the institutional level is the Swiss Chambers of Commerce.<sup>380</sup> The SCC emerged in 2004 from a cooperation of the Swiss Chambers of Commerce of Basel, Berne, Geneva, Neuchâtel, Vaud, Ticino and Zurich which are private institutions representing a multitude of companies within industry, the service sector and commerce. The SCC is organized in committees.<sup>381</sup> SCCAM offers international arbitration and mediation based on its own institutional rules.<sup>382</sup>

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<sup>379</sup> The LCIA Arbitration Rules and the LCIA Mediation Procedure are available at <http://www.lcia.org>.

<sup>380</sup> Swiss Chambers of Commerce (hereinafter "SCC"). For further information see <https://www.sccam.org>.

<sup>381</sup> Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 520.

<sup>382</sup> The Swiss Rules of International Arbitration and the Swiss Rules of Commercial Mediation are available at <https://www.sccam.org>.

#### 4.1.6 VIAC

In 1975, the Austrian Federal Economic Chamber established the Vienna International Arbitral Centre<sup>383</sup> exclusively for the settlement of international disputes. The Rules of Arbitration and Conciliation, often referred to as Vienna Rules,<sup>384</sup> were enacted the same year. They generally regulate arbitration proceedings but in addition offer conciliation proceedings. The VIAC's organisation consists of the Board, having at least five members, one of them being the VIAC's President,<sup>385</sup> the International Advisory Board<sup>386</sup> and the Secretariat, headed by the Secretary General.<sup>387</sup> The VIAC is a public law corporation located in Vienna.

#### 4.1.7 CEDR

Launched in 1990 with the support of the Confederation of British Industry and leading law firms, business and public sector the Centre for Effective Dispute Resolution<sup>388</sup> is an independent and neutral dispute resolution service located in London. CEDR is specialized in commercial dispute settlement and belongs to the leading commercial ADR provider in Europe. CEDR has further played a major role in bringing mediation into business practice and into the judicial system in England and Wales. As stated by Clift, in the United Kingdom, the ground breaking work on mediation was probably done by CEDR in the early

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<sup>383</sup> Vienna International Arbitral Centre (hereinafter "VIAC"). Further information on the VIAC is available at <http://wko.at/arbitration/>.

<sup>384</sup> Rules of Arbitration and Conciliation (hereinafter "Vienna Rules").

<sup>385</sup> Art. 3 (1) (2) VIAC Arbitration Rules.

<sup>386</sup> Art. 4 VIAC Arbitration Rules.

<sup>387</sup> Art. 5 (2) VIAC Arbitration Rules.

<sup>388</sup> Centre for Effective Dispute Resolution (hereinafter "CEDR"). For further information on CEDR see <http://www.cedr.com/>.



1990s.<sup>389</sup> CEDR is a founding member of MEDAL<sup>390</sup> – an international alliance of mediation providers – and has access to mediators internationally. CEDR offers training in mediation, equips business people and professionals with conflict management skills and provides consultancy services in dispute management to business, law firms and public sector organisations. Leading companies, governments and public-sector organisations use CEDR expertise to devise schemes and procedures to manage all kinds of conflict, within the organisation or externally, with customers, partners and other stakeholders. CEDR membership is open to private organisations, public authorities and law firms. Currently, CEDR has over 100 corporate and law firm members. In addition CEDR has 500 members of the CEDR Exchange, a network for individuals. CEDR has drafted several model documents including ADR contract clauses<sup>391</sup>, mediation process documents<sup>392</sup> and other ADR process documents<sup>393</sup>.

#### 4.1.8 MEDAL

MEDAL an international mediation services alliance which groups together five leading dispute resolution providers in their respective countries, including

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<sup>389</sup> Clift, Introduction to Alternative Dispute Resolution: A Comparison Between Arbitration and Mediation (2007), available at <http://www.linexlegal.com/index.php>.

<sup>390</sup> See section 4.1.8 below.

<sup>391</sup> CEDR Model ADR Contract Clauses, CEDR's Model International ADR Contract Clause, CEDR Model Employment Contract Clauses, all available at [http://www.cedr.com/about\\_us/library/documents.php](http://www.cedr.com/about_us/library/documents.php).

<sup>392</sup> CEDR Model Mediation Agreement (10th Edition), Notes on the 10th Edition to the mediation documents, CEDR Model Mediation Procedure (10th Edition), CEDR Code of Conduct for Mediators, CEDR Model Settlement Agreement, CEDR Model Project Mediation Protocol and Agreement, CEDR Dispute Resolution Procedure for PFI and Long-Term Contracts, CEDR Model Mediation Procedure and Agreement (9A Edition), all available at [http://www.cedr.com/about\\_us/library/documents.php](http://www.cedr.com/about_us/library/documents.php).

<sup>393</sup> CEDR Model Early Neutral Evaluation Agreement, CEDR Model Executive Tribunal Procedure, CEDR Model Expert Determination Agreement, CEDR Rules for Construction Adjudication, all available at [http://www.cedr.com/about\\_us/library/documents.php](http://www.cedr.com/about_us/library/documents.php).

CEDR and ADR Group.<sup>394</sup> Their aggregate revenues amount to over 90 million Euro.<sup>395</sup> MEDAL alliance group consist of an international panel of 300 professionals, from 40 nations, on 5 continents, having the ability to work in multinational co-mediation teams in over 20 languages coming from some 28 offices in Europe and in the United States.<sup>396</sup> Consequently, parties to particularly complex cross-border business disputes may have the support of an international team of experts. Such international disputes may include amongst other areas disputes in transportation and shipping; insurance, finance and banking, entertainment and leisure, construction and development, professional services and consultancies, consumables and luxury goods, and employment disputes in multinational corporations.

As per another example for a MEDAL member organization (next to CEDR), there shall be some brief comments on ADR Center at this point. Established in 1998 by two individuals, ADR Center is an independent and neutral organization supporting companies and their lawyers in preventing and effectively managing disputes.<sup>397</sup> ADR Center manages several hundred dispute enquiries per year, mostly involving foreign entities.<sup>398</sup> The area of expertise include corporate, banking/financial, commercial, employment, construction, communication, insurance, family, medical accountability, intellectual property and international disputes.<sup>399</sup> ADR Center is based in Rome and has become a renowned mediation provider.

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<sup>394</sup> United States - JAMS - ([www.jamsadr.com](http://www.jamsadr.com)), France - CMAP - ([www.mediationetarbitrage.com](http://www.mediationetarbitrage.com)), The Netherlands - ACB - ([www.acbmediation.nl](http://www.acbmediation.nl)), United Kingdom - CEDR - ([www.cedr.co.uk](http://www.cedr.co.uk)), Italy - ADR Center - ([www.adrcenter.it](http://www.adrcenter.it)).

<sup>395</sup> <http://www.adrcenter.com/international/medal.html>.

<sup>396</sup> <http://www.adrcenter.com/international/medal.html>.

<sup>397</sup> For further information on ADR Center see <http://www.adrcenter.com/>.

<sup>398</sup> [http://www.medal-mediation.com/News\\_280905.html](http://www.medal-mediation.com/News_280905.html).

<sup>399</sup> For the particularities of each practice area see <http://www.adrcenter.com/focus/international.html>.

ADR Center's panel of neutrals show experience in the field of dispute resolution procedure and practice. ADR Center employs client advisors who assist in drafting and adapting ADR contractual clauses, design and develop business conflict management systems, aid development of ADR departments within law firms and organizes training courses in mediation advocacy. Case managers assist the parties and the neutral before, during and after the conduct of the mediation.

## 4.2 UNCITRAL Conciliation Rules

### 4.2.1 General

Differentiation must be made between the UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use<sup>400</sup> and the UNCITRAL Conciliation Rules<sup>401</sup>.

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<sup>400</sup> UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use (hereinafter "UNCITRAL Model Law"). Resolution adopted by the General Assembly, Fifty-seventh Session, A/RES/57/18, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html). For a description of the UNCITRAL Model Law on International Commercial Conciliation see Binder, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions<sup>2</sup> (2005) p. 297 et seq.; Baker/Ali, A cross-comparison of institutional mediation rules in Dispute Resolution Journal (2002) available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_ai\\_n9060837](http://findarticles.com/p/articles/mi_qa3923/is_ai_n9060837).

<sup>401</sup> UNCITRAL Conciliation Rules (hereinafter "UNCITRAL Rules"), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1980Conciliation\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html). Please note that the terms conciliation and mediation in general describe a voluntary process using a neutral third party or a panel of neutrals to facilitate settlement agreement between the parties. The use of those two words may be confusing in the international dispute settlement contexts, because they are not always used interchangeably. However, the main difference often recognized is that conciliation is sometimes used to describe a process in which the conciliator will make settlement recommendations jointly to the parties (UNCITRAL Conciliation Rules, VIAC Conciliation Rules), while the mediator strictly does not recommend settlement options. A uniform international standard with respect to conciliation and mediation does not exist. See Shane/Hassan, Initiating and International Mediation in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 2.02.

The UNCITRAL Model Law was adopted by UNCITRAL in 2002. The aim of the General Assembly was to establish a model legislation that is acceptable to states with different legal, social and economic systems.<sup>402</sup> The General Assembly believed that the UNCITRAL Model Law "will significantly assist States in enhancing legislation governing the use of modern conciliation or mediation techniques and in formulating such legislation where none currently exists."<sup>403</sup> Legislation based on the UNCITRAL Model Law has been enacted in Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005) and Slovenia (2008).<sup>404</sup> The UNCITRAL Model Law provides uniform rules in respect of the conciliation process to encourage the use of conciliation and ensure greater predictability and certainty in its use.

More than a decade before the adoption of the UNCITRAL Model Law, on 23 July 1980, the General Assembly adopted the UNCITRAL Rules, which provide a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship.<sup>405</sup> The UNCITRAL Rules contain a comprehensive set of procedural rules on conciliation and cover all aspects of the conciliation process. The primary consideration is to further the parties in reaching an amicable settlement.<sup>406</sup>

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<sup>402</sup> Resolution adopted by the General Assembly, A/RES/57/18, p. 1.

<sup>403</sup> Preamble, UNCITRAL Model Law.

<sup>404</sup> The current status of the UNCITRAL Model Law is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html)

<sup>405</sup> UNCITRAL Conciliation Rules, available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>. Further information on the UNCITRAL Rules may be obtained from: UNCITRAL Secretariat, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria; Telephone: (+43 1) 26060-4060; Fax: (+43 1) 26060-5813; Internet: <http://www.uncitral.org>; E-mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org).

<sup>406</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 101.

#### 4.2.2 Speciality

A special feature of the UNCITRAL Rules is the fact that the conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.<sup>407</sup> There is no special form or content foreseen for such proposal. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of the parties' observations.<sup>408</sup> Another speciality of the UNCITRAL Rules is that the UNCITRAL Secretariat does not get involved in the administration of conciliation proceedings. Consequently, the conciliator itself determines the cost of the conciliation proceedings.

#### 4.2.3 Role of the institution

Although UNCITRAL and its Secretariat have prepared legislative and contractual provisions and rules relating to conciliation and especially to international commercial arbitration<sup>409</sup>, it is not within UNCITRAL's mandate to become involved in individual disputes. Consequently, UNCITRAL does not offer legal advice in specific disputes, and, in particular, does not administer proceedings or otherwise perform any function related to individual proceedings. A reference in a dispute settlement clause to the UNCITRAL Rules means that the parties agree that an existing or a future dispute should be settled in accordance with the UNCITRAL Rules.

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<sup>407</sup> Arts. 7 (4) and 13 (1) UNCITRAL Rules.

<sup>408</sup> Art. 13 (1) UNCITRAL Rules.

<sup>409</sup> 2006 - Recommendation regarding the interpretation of article II (2), and article VII (1), of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); 1996 - UNCITRAL Notes on Organizing Arbitral Proceedings; 1985 - UNCITRAL Model Law on International Commercial Arbitration (amended in 2006); 1982 - Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules; 1976 - UNCITRAL Arbitration Rules; 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention, all available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html).

Lacking institutional assistance by UNCITRAL, the parties may agree to arrange for administrative assistance by a suitable institution (e.g. the LCIA) or person.<sup>410</sup> Administrative assistance can take the form of forwarding communications, providing interpretation and translation services, organising meetings and providing assistance with travel arrangements.<sup>411</sup>

#### 4.2.4 Scope

The UNCITRAL Rules are designed for universal application.<sup>412</sup> Subject to an agreement by the parties, the UNCITRAL Rules principal field of application shall be in disputes arising in the context of international commercial relations.<sup>413</sup> Disputes relating to a contractual or other legal relationship may be subject to conciliation.<sup>414</sup> Consequently, conciliation may be used in all kinds of disputes, which are capable of being settled by agreement of the parties.<sup>415</sup> The parties may agree to exclude or vary any of the UNCITRAL Rules at any time.

The UNCITRAL Rules do not contain a definition of conciliation. In the Commentary on the revised draft of UNCITRAL Conciliation Rules conciliation is defined as a method used by parties to a dispute to reach an amicable settlement with the assistance of an independent third person or institution.<sup>416</sup>

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<sup>410</sup> Art. 8 UNCITRAL Rules.

<sup>411</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 105.

<sup>412</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 102.

<sup>413</sup> Art. 1 (1) UNCITRAL Rules.

<sup>414</sup> Art. 1 (1) UNCITRAL Rules.

<sup>415</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 102.

<sup>416</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 101.

#### 4.2.5 Commencement and termination

As all institutional rules, the UNCITRAL Rules have no statutory force. They apply by (written, oral or implicit) agreement of the parties.<sup>417</sup> The party initiating conciliation sends to the other party a written invitation to conciliate, very briefly identifying the subject matter of the dispute.<sup>418</sup> Conciliation proceedings commence when the other party accepts, either in writing or orally, the invitation to conciliate.<sup>419</sup> If the other party rejects the invitation or does not reply within thirty days (or any other time period set by the inviting party) from the date on which the invitation was sent, there will be no conciliation proceedings.<sup>420</sup>

The conciliation proceedings terminate by (i) the signing of the settlement agreement by the parties, (ii) a written declaration of the conciliator, (iii) a joint/sole written declaration of the parties/a party and (iv) upon failure to pay the deposit for cost.<sup>421</sup>

#### 4.2.6 Parties

The parties have the duty to co-operate in good faith with the conciliator.<sup>422</sup> This includes complying with requests by the conciliator to submit written materials,

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<sup>417</sup> Art. 1 (1) UNCITRAL Rules. The UNCITRAL Rules contain a model conciliation clause: "Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force." The clause is available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>.

<sup>418</sup> Art. 2 (1) UNCITRAL Rules.

<sup>419</sup> Art. 2 (2) UNCITRAL Rules.

<sup>420</sup> Art. 2 (3) (4) UNCITRAL Rules.

<sup>421</sup> Arts. 15 and 18 (3) UNCITRAL Rules.

<sup>422</sup> Art. 11 UNCITRAL Rules.

provide evidence and attend meetings.<sup>423</sup> Parties may submit suggestions for the settlement of the dispute to the conciliator.<sup>424</sup> Parties must adhere to the strict duty of confidentiality<sup>425</sup> and shall only institute adversarial proceedings if it is necessary for preservation of their rights<sup>426</sup>. Due to the policy of freedom, parties may terminate the conciliation proceedings at any time.<sup>427</sup> In addition a party must pay an advance on cost and any other cost related to conciliation proceedings.<sup>428</sup>

#### 4.2.7 Mediator

Under the UNCITRAL Rules, the neutral third party is called conciliator. Unless the parties agree otherwise, there shall be one conciliator.<sup>429</sup> Certain complex disputes may require special expertise in more than one area (for example: law, trade usage, finance, banking, engineering, telecommunication) and request appointment of two or three conciliators. Consequently, the UNCITRAL Rules provide that parties may agree on appointing two or three conciliators.<sup>430</sup> Even numbers of conciliators are accepted. Since conciliators solely recommend settlement options but do not render binding decisions there is not need for an uneven number of conciliators.<sup>431</sup>

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<sup>423</sup> Art. 11 UNCITRAL Rules.

<sup>424</sup> Art. 12 UNCITRAL Rules.

<sup>425</sup> Arts. 10 and 14 UNCITRAL Rules.

<sup>426</sup> Art. 16 UNCITRAL Rules.

<sup>427</sup> Art. 15 UNCITRAL Rules.

<sup>428</sup> Arts. 17 and 18 UNCITRAL Rules.

<sup>429</sup> Art. 3 UNCITRAL Rules.

<sup>430</sup> Art. 3 UNCITRAL Rules.

<sup>431</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 103.



The appointment procedure of the conciliator depends on the number of conciliators chosen.<sup>432</sup> Article 4 UNCITRAL Rules contains guidance: Where there is one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator. In conciliation proceedings with two conciliators, each party appoints one conciliator. In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator. Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In any case conciliators ought to, as a general rule, act jointly.<sup>433</sup>

As a general principle for basically all institutional rules described in this paper, the conciliator can come from every professional background and does not have to undergo a special training to be appointed as conciliator. The conciliator must however meet certain qualifications and attributes. The principles of independency, impartiality, objectivity, fairness and justice in assisting the parties are of utter importance.<sup>434</sup> The conciliator must further give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.<sup>435</sup>

As stated under section 4.2.2 above, the conciliator has the power to propose settlement options to the parties.<sup>436</sup>

#### 4.2.8 Representation

Article 6 UNCITRAL Rules explicitly provides that parties to conciliation proceedings may be represented or assisted by persons of their choice. The

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<sup>432</sup> Art. 4 UNCITRAL Rules.

<sup>433</sup> Art. 3 UNCITRAL Rules.

<sup>434</sup> Art. 7 (1) (2) UNCITRAL Rules.

<sup>435</sup> Art. 7 (2) UNCITRAL Rules.

<sup>436</sup> Art. 7 (4) UNCITRAL Rules.

names, addresses and roles of such persons are to be communicated in writing to the other party and to the conciliator.

#### 4.2.9 Proceedings

After appointment of the conciliator each party shall send a brief written statement to the conciliator and the other party. This statement shall describe the general nature of the dispute, the position of the party and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate.<sup>437</sup> The conciliator may request each party to submit further information.<sup>438</sup> It is up to the conciliator's discretion whether to disclose the information provided after the first brief to the other party.<sup>439</sup>

In order to conduct conciliation proceedings in an informal and flexible manner, the conciliator is endeavoured with a reasonably wide discretion and may conduct the conciliation proceedings in such a manner as he considers appropriate.<sup>440</sup> He must however, consider the principles stated under section 4.2.7 above and take into account the circumstances of the case, the wishes the parties may express and the need for a speedy settlement of the dispute.<sup>441</sup> The conciliator's discretion does not extend to appointing experts or hearing witnesses.<sup>442</sup> Necessarily involving cost, such decision requires the consent of the parties.

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<sup>437</sup> Art. 5 (1) (2) UNCITRAL Rules.

<sup>438</sup> Art. 5 (2) (3) UNCITRAL Rules.

<sup>439</sup> Art. 10 UNCITRAL Rules, Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 104.

<sup>440</sup> Art. 7 (3) UNCITRAL Rules.

<sup>441</sup> Art. 7 (3) UNCITRAL Rules.

<sup>442</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 105.

Conciliation proceedings can be conducted through meetings, orally and in writing.<sup>443</sup> The conciliator may communicate with the parties together or with each of them separately.<sup>444</sup> Unless the parties agree otherwise, the conciliator will determine the place where meetings with the conciliator are to be held.<sup>445</sup> The conciliator shall take into account the parties' wishes and regard the circumstances of the conciliation proceedings.<sup>446</sup>

#### 4.2.10 Confidentiality

The UNCITRAL Rules contain a strict obligation to confidentiality, which prohibits disclosure of information to outsiders. The conciliator and the parties must observe the duty to confidentiality.<sup>447</sup> An exception applies to the disclosure of the settlement agreement for the purposes of implementation and enforcement.<sup>448</sup> According to article 19 UNCITRAL Rules, the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.<sup>449</sup> In addition, the parties will not present the conciliator as a witness in any such adjudatory proceedings.<sup>450</sup>

The obligation to treat information confidential extends to all matters relating to the conciliation proceedings.<sup>451</sup> With regard to arbitral or judicial proceedings, this includes in particular (i) views expressed or suggestions made by the other

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<sup>443</sup> Art. 9 (1) UNCITRAL Rules.

<sup>444</sup> Art. 9 (1) UNCITRAL Rules.

<sup>445</sup> Art. 9 (2) UNCITRAL Rules.

<sup>446</sup> Art. 9 (2) UNCITRAL Rules.

<sup>447</sup> Art. 14 UNCITRAL Rules.

<sup>448</sup> Art. 13 UNCITRAL Rules.

<sup>449</sup> Art. 19 UNCITRAL Rules.

<sup>450</sup> Art. 19 UNCITRAL Rules.

<sup>451</sup> Art. 13 UNCITRAL Rules.

party in respect of a possible settlement of the dispute, (ii) admissions made by the other party in the course of the conciliation proceedings, (iii) proposals made by the conciliator and (iv) the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.<sup>452</sup>

As stated under section 4.2.9 above, the UNCITRAL Rules contain a provision regulating disclosure of information between the participants of the conciliation already during conciliation proceedings. Despite the first brief, which shall be exchanged between the parties in any case, it is up to the conciliator's discretion to decide about the flow of information between the parties.<sup>453</sup> A party may however demand the conciliator to treat certain information confidential.<sup>454</sup>

#### 4.2.11 Voluntariness

The UNCITRAL Rules do not contain a separate provision dealing with voluntariness of the conciliation proceedings. However, a policy consideration underlying the UNCITRAL Rules is the parties' freedom to initiate, proceed and terminate conciliation proceedings.<sup>455</sup> Conciliation cannot commence without agreement by the parties. Taken from the reasons for termination it is clear that each party may terminate the conciliation proceedings at any time without stating any reasons. The UNCITRAL Rules do not contain an element of compulsion. There is not even an obligation to participate in a first information session on conciliation.

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<sup>452</sup> Art. 20 UNCITRAL Rules.

<sup>453</sup> Art. 10 UNCTRAL Rules, Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 105.

<sup>454</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 105.

<sup>455</sup> Commentary on the revised draft of UNCITRAL Conciliation Rules in Yearbook of the United Nations Commission on International Trade Law, 1980, Vol. XI, p. 101, 103.

#### 4.2.12 Mediation settlement agreement

If the parties reach agreement on a settlement of the dispute, they draw up (with the assistance of the conciliator) and sign a written settlement agreement.<sup>456</sup> National and international law must be considered with regard to enforcement of such settlement agreement.

#### 4.2.13 Judicial and arbitral proceedings

By agreeing to the UNCITRAL Rules, parties agree not to resort to arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation during the conciliation proceedings.<sup>457</sup> Except that a party may initiate adversarial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.<sup>458</sup> This may be the case where a party wants to prevent the expiration of a prescription period. With regard to the suspension of limitation periods, the applicable national laws must be considered.

#### 4.2.14 Cost

In UNCITRAL conciliation proceedings, cost comprises payments to (i) the conciliator (reasonable fee, travel and other expenses), (ii) witnesses (travel and other expenses), experts (expert advice) and an appointing institution (appointment of conciliator).<sup>459</sup> The UNCITRAL Rules do not give further guidance on reasonable amounts for the costs.

The conciliator may upon his appointment and during the course of the conciliation proceedings request each party to deposit an equal amount as an advance for the costs of the conciliation.<sup>460</sup> Failure to undertake due payment of the deposit may result in suspension or termination of the conciliation

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<sup>456</sup> Art. 13 (2) UNCITRAL Rules.

<sup>457</sup> Art. 16 UNCITRAL Rules.

<sup>458</sup> Art. 16 UNCITRAL Rules.

<sup>459</sup> Art. 17 (1) UNCITRAL Rules.

<sup>460</sup> Art. 18 (1) (2) UNCITRAL Rules.

proceedings.<sup>461</sup> The conciliator himself determines the costs of the conciliation upon termination of the proceedings and gives written notice thereof to the parties.<sup>462</sup>

Unless the settlement agreement provides for a different apportionment, costs are borne equally by the parties.<sup>463</sup> All other expenses incurred by a party shall remain the responsibility of that party.<sup>464</sup> This is a special feature of the UNCITRAL Rules. Other institutions that get involved in the administration of mediation proceedings generally determine the cost.

### 4.3 ICC ADR Rules

#### 4.3.1 General

In 1988 the ICC enacted the ICC Rules of Optional Conciliation. These were replaced by the ICC ADR Rules in force as from 1 July 2001, applicable for both, domestic and international ADR proceedings.<sup>465</sup> The ICC Rules are the

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<sup>461</sup> Art. 18 (3) UNCITRAL Rules.

<sup>462</sup> Art. 17 (1) UNCITRAL Rules.

<sup>463</sup> Art. 17 (2) UNCITRAL Rules.

<sup>464</sup> Art. 17 (2) UNCITRAL Rules.

<sup>465</sup> ICC ADR Rules (hereinafter "ICC Rules"); available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr\\_rules.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf). Further available at Yearbook Commercial Arbitration, van den Berg (ed.) Vol. XXVI (2001), p. 400 et seq. The ICC has drafted the Guide the ICC ADR (hereinafter "ICC Guide") which is intended to be a brief commentary on the ICC Rules, in simple language, for the benefit of users of ICC ADR. The Guide is available at [http://www.iccwbo.org/drs/english/adr/pdf\\_documents/adr\\_guide.pdf](http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_guide.pdf). The ICC Rules and the ICC Guide are available in English, German, French, Russian, Portuguese and Spanish language at <http://www.iccwbo.org/court/adr/id4452/index.html>. A brief description of the ICC Rules is included in Baker/Ali, A cross-comparison of institutional mediation rules in Dispute Resolution Journal (2002) available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_/ai\\_n9060837](http://findarticles.com/p/articles/mi_qa3923/is_/ai_n9060837); Lionnet/Lionnet, Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit<sup>3</sup> (2005) p. 469 et seq.; Schäfer/Verbist/Imhoos, ICC Arbitration in Practice (2005) p. 175 et seq.; Bühring-Uhle/Scherer/Kirchhoff, Arbitration and Mediation in International Business<sup>2</sup> (2006) p. 223.

result of discussions between several dispute resolution experts and representatives of the business community from 75 countries. Their purpose is to offer business partners a means of resolving disputes amicably, in the way best suited to their needs.

While the ICC publishes the number of arbitrations yearly filed under its' rules<sup>466</sup> the ICC does not publish statistics as to the number of mediations it has administered. The only data available show, that until 2004 ICC ADR was not very often resorted to: In 2003, only 8 cases were administered under ICC ADR as opposed to 580 under the ICC's Rules of Arbitration.<sup>467</sup>

#### 4.3.2 Speciality

The ICC Rules are breadth and flexible in nature. They contain only seven articles. This small number is intended to leave the parties with as much procedural freedom as possible.

A distinctive feature of the ICC Rules is the freedom of the parties to choose the ADR dispute settlement technique they consider most conducive to amicable settlement of their dispute.<sup>468</sup> ICC ADR Rules allow for the use of several different techniques. ADR dispute settlement techniques include all proceedings, which do not result in a decision or award of the neutral, which can be enforced by law.<sup>469</sup> The neither limiting nor exhaustive range of ADR settlement techniques contained in the ICC Guide include mediation, neutral evaluation, mini-trial, any other dispute settlement technique or a combination

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<sup>466</sup> In 2007 a total of 599 new arbitration cases were filed. International Chamber of Commerce, ICC in 2008 – Achievements, goals and leadership, ICC Publication No. 845.

<sup>467</sup> Bühring-Uhle/Scherer/Kirchhoff, *Arbitration and Mediation in International Business*<sup>2</sup> (2006) p. 226.

<sup>468</sup> Art. 5 (1) ICC Rules. Baker/Ali critically observed that this very feature might become a source of delay and adds a level of procedural complexity. See Baker/Ali, *A cross-comparison of institutional mediation rules in Dispute Resolution Journal* (2002) available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_ai\\_n9060837](http://findarticles.com/p/articles/mi_qa3923/is_ai_n9060837).

<sup>469</sup> ICC Guide, p. 3.

of settlement techniques.<sup>470</sup> Whichever ADR proceeding is used, the parties must make sure that they have the same approach to the settlement technique used. Failing agreement on the method to be adopted, the fallback shall be mediation – which is, according to the ICC Guide, the most common ADR technique.<sup>471</sup>

Another special feature of the ICC Rules is the compulsion to participate in a first discussion with the neutral on which dispute settlement method shall be used for the respective dispute.<sup>472</sup>

The ICC ADR Rules are generally understood to allow the neutral to decide whether to make settlement proposals in a particular case.<sup>473</sup>

#### 4.3.3 Role of the institution

The ICC's department dispute resolution services – not the ICC Court – administers ADR proceedings.<sup>474</sup> The ICC's involvement starts with the request for ADR and ends with the termination of the proceedings. Parties wishing to initiate ICC ADR proceedings must send a request for ADR to the ICC. The ICC will inform the other parties about the request for ADR. Further ICC gets involved with the appointment of the neutral if the parties do not jointly designate a neutral.

#### 4.3.4 Scope

Application of the ICC Rules entirely depends upon the parties to a dispute. The ICC Rules apply if the parties agree to submit their dispute to ADR

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<sup>470</sup> Art. 5 ICC Guide.

<sup>471</sup> Preamble, ICC Rules; ICC Guide, p. 5.

<sup>472</sup> See section 4.3.5 and 4.3.11 below.

<sup>473</sup> Shane/Hassan, *Initiating and International Mediation in Rhoades/Kolkey/Chernik* (ed.) *Practitioners Handbook on International Arbitration and Mediation*<sup>2</sup> (2007) sec. II. 2.02.

<sup>474</sup> See Lionnet/Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*<sup>9</sup> (2005) p. 469.



proceedings according to the ICC Rules.<sup>475</sup> Subject to the ICC's approval, the parties may modify the content of the ICC Rules.<sup>476</sup> All domestic or international business disputes may be subject to ICC ADR proceedings.<sup>477</sup> Consequently, ICC Rules cannot be used for the resolution of family or labour disputes.<sup>478</sup>

#### 4.3.5 Commencement and termination

The ICC Rules distinguish between those cases where ADR proceedings commence pursuant to an ADR clause contained in the contract between the parties or based upon a subsequent agreement once the dispute has arisen.

Parties wishing to commence ADR proceedings shall, either jointly or unilaterally, send a written request for ADR to the ICC.<sup>479</sup> The request for ADR can be filed by mail, fax or email.<sup>480</sup> The request for ADR shall include (i) personal data of the parties, (ii) a succinct description of the dispute, (iii) joint designation of, or appointing modalities for the neutral, (iv) ADR agreement and the (v) registration fee.<sup>481</sup> The ADR agreement must be in writing (for example, included in the underlying contract or a subsequent agreement between the parties). If the parties do not file the request jointly, although there is an agreement to submit the dispute to ICC ADR, the party filing the request must simultaneously send the request for mediation to the other party. Where there is no written agreement to refer the dispute to ICC ADR, the ICC shall request the other party to inform the ICC as to whether the other party agrees or

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<sup>475</sup> Art. 2 ICC Rules. The ICC Rules contain four model ICC ADR clauses, available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr\\_rules.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf).

<sup>476</sup> Art. 1 ICC Rules.

<sup>477</sup> Art. 1 ICC Rules.

<sup>478</sup> Art. 1 ICC Guide.

<sup>479</sup> Art. 2 ICC Rules.

<sup>480</sup> The request for ADR can be addressed to: International Chamber of Commerce, ICC Dispute Resolution Services – ADR, 38 cours Albert 1<sup>er</sup>, 75008 Paris, France; Fax: +33 1 49532929; Email: [adr@iccwbo.org](mailto:adr@iccwbo.org).

<sup>481</sup> Art. 2 A 1 (a)-(e) ICC Rules.

declines to participation in the ADR proceeding.<sup>482</sup> In the absence of a positive reply ADR proceedings shall not commence.<sup>483</sup> In any other case, ADR proceedings proceed with the appointment of the neutral.

The ICC Rules contain a list of situations where ADR proceedings end. ADR proceedings terminate upon (i) failure to pay the deposit to the ICC, (ii) failure to appoint a neutral, (iii) expiration of time, (iv) the written notification of termination by one or more parties or the neutral and (v) clearly the best possible situation, signature of a mediation settlement agreement by the parties.<sup>484</sup> Where there exists an agreement to submit a dispute to ICC ADR, parties cannot withdraw from the ADR proceedings prior to the first discussion with the neutral on which dispute settlement method shall be used for the respective dispute.<sup>485</sup> The discussion can take place via a meeting among the parties and the neutral, which is the most preferable method. Telephone conferences, videoconferences or any other suitable means may however be used as well.<sup>486</sup>

#### 4.3.6 Parties

ADR proceedings depend upon the parties' agreement to ADR, acceptance of a neutral<sup>487</sup> and payment of the deposit, including a registration fee, the ICC's administrative expenses and the neutral's fees and expenses.<sup>488</sup> Parties have a duty to confidentiality<sup>489</sup> and shall cooperate in good faith with the neutral.<sup>490</sup>

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<sup>482</sup> Art. 2 B 1 and 2 ICC Rules.

<sup>483</sup> Art. 2 B 2 ICC Rules.

<sup>484</sup> Art. 6 (1) (a)-(e) ICC Rules.

<sup>485</sup> Art. 5 (1) ICC Rules.

<sup>486</sup> Art. 5 ICC Guide.

<sup>487</sup> Art. 3 ICC Rules.

<sup>488</sup> Art. 4 and Appendix ICC Rules.

<sup>489</sup> Art. 7 (2) (a)-(e) ICC Rules.

#### 4.3.7 Mediator

As the ICC Rules not only include mediation but also other amicable dispute settlement methods, the neutral third party is not called mediator but neutral. Such neutral may be jointly designated by the parties or – after agreement by the parties and notification of the ICC – be appointed by the ICC.<sup>491</sup> In case a party objects to the neutral appointed by the ICC within 15 days from the time they are notified of the appointment, the ICC shall promptly appoint another neutral.<sup>492</sup> The neutral is requested to provide curriculum vitae to the ICC and must submit a statement of independence.<sup>493</sup> Prior to accepting the mandate to act as a neutral the neutral shall, based upon the description of the dispute in the request for ADR, determine his ability to act as neutral in the particular ADR proceeding.<sup>494</sup>

The ICC ADR Rules do not include a definition of mediation or mediator.<sup>495</sup> They further do not contain any rules regarding the professional education of the neutral. They do however give a glance on what prerequisites must be fulfilled by the neutral: The neutral must be (i) independent from the parties and the dispute and (ii) be guided by the principles of fairness, impartiality and the wishes of the parties.<sup>496</sup> However, the neutral must not go through a certain education in order to qualify as third party under ICC ADR procedures. The parties introduce some quality standards through for example agreeing that the

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<sup>490</sup> Art. 5 (5) ICC Rules.

<sup>491</sup> Art. 2 ICC Rules.

<sup>492</sup> Art. 2 (3) ICC Rules.

<sup>493</sup> Art. 3 (2) ICC Rules.

<sup>494</sup> Art. 2. A ICC Guide.

<sup>495</sup> The ICC Guide contains a brief description of mediation. Mediation is described as a settlement technique where the “neutral acts as facilitator to help the parties try to arrive at a negotiated settlement of their dispute.” The ICC Guide explicitly states that the neutral generally holds joint meetings as well as separate meetings (caucuses).

<sup>496</sup> Art. 5 (3) ICC Rules.

neutral needs to have a certain experience or background education in the respective field of the dispute (i.e. engineering, telecommunication, banking, finance, law...).

The ICC Rules do not contain a statement as to the number of the neutrals to be appointed. Article 3 (4) ICC Rules however allows the parties to designate more than one neutral and ICC to propose that more than one neutral be appointed.<sup>497</sup> The appointment of two or more neutrals may be appropriate for instance when the parties wish to have neutrals with different qualifications or professional backgrounds.<sup>498</sup>

After designation of the neutral, the first meeting between the neutral and the parties is dedicated to decide upon which method of dispute settlement shall be used.<sup>499</sup> In the absence of an agreement by the parties, mediation shall be used.<sup>500</sup>

#### 4.3.8 Representation

The ICC Rules do not deal with representation during ADR proceedings.

#### 4.3.9 Proceedings

The ICC Rules allow the parties and, in the event they are unable to agree, the neutral, considerable freedom to conduct the ADR proceedings.<sup>501</sup> Subject to the principles of fairness and impartiality and the wishes of the parties, the neutral shall conduct the procedure in such manner as the neutral sees fit.<sup>502</sup> In the absence of an agreement of the parties, the neutral shall determine the

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<sup>497</sup> Art. 3 (4) ICC Rules.

<sup>498</sup> Schäfer/Verbist/Imhoos, ICC Arbitration in Practice (2005) p. 180.

<sup>499</sup> Art. 5 ICC Rules.

<sup>500</sup> Art. 5 (2) ICC Rules.

<sup>501</sup> Schäfer/Verbist/Imhoos, ICC Arbitration in Practice (2005) p. 180.

<sup>502</sup> Art. 5 (3) ICC Rules.

language or languages of the proceedings and the place of any meetings to be held.<sup>503</sup>

#### 4.3.10 Confidentiality

As per the ICC Rules, the ADR proceedings, including their outcome, are private and confidential. Rules on confidentiality regard both, the parties and the neutral.

The ICC Rules stipulate that a party shall not produce certain information as evidence in judicial, arbitration or similar proceedings. This includes (i) any documents, statements or communications which are submitted by another party or by the neutral in the ADR proceedings, unless they can be obtained independently by the party seeking to produce them in the judicial, arbitration or similar proceedings, (ii) any views expressed or suggestions made by any party within the ADR proceedings with regard to the possible settlement of the dispute, (iii) any admissions made by another party within the ADR proceedings, (iv) any views or proposals put forward by the neutral or (v) the fact that any party had indicated within the ADR proceedings that it was ready to accept a proposal for a settlement.<sup>504</sup> Where a party files a request for ICC ADR, without a contract wherein the parties have previously agreed to subject their disputes to ICC ADR, and the other party refuses to participate in ICC ADR, there is no guarantee that the unilateral request for ADR will be kept confidential.<sup>505</sup>

Unless all of the parties agree otherwise in writing, a neutral shall not act nor shall have acted in any judicial, arbitration or similar proceedings relating to the dispute which is or was the subject of the ADR proceedings, whether as a judge, as an arbitrator, as an expert or as a representative or advisor of a party.<sup>506</sup> Consequently, it is entirely permissible for a neutral to act in such

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<sup>503</sup> Art. 5 (4) ICC Rules.

<sup>504</sup> Art. 7 (2) (a)-(e) ICC Rules.

<sup>505</sup> Schäfer/Verbist/Imhoos, ICC Arbitration in Practice (2005) p. 181.

<sup>506</sup> Art. 7 (3) ICC Rules.

capacity with regard to the same dispute if all of the parties to the ADR proceedings agree thereto. Further, the neutral, unless required by applicable law or unless all of the parties agree otherwise in writing, shall not give testimony in any judicial, arbitration or similar proceedings concerning any aspect of the ADR proceedings.<sup>507</sup>

Rules on confidentiality may be modified by agreement of the parties.

#### 4.3.11 Voluntariness

The ICC Rules do not contain an explicit provision stating that ICC ADR proceedings are of voluntary nature. However, considering the options for termination, a situation where the parties are forced to mediation does not exist: ADR proceedings terminate through actions of the parties (signing of a settlement agreement, notification of termination), the neutral (notification of termination, expiration of time), the ICC (parties' failure to undertake payments in due time, failure to designate a neutral).<sup>508</sup> Consequently, participation in ICC ADR is voluntary.

However, where the parties have agreed to mediate (via a contract, subsequent agreement or acceptance of ICC ADR), there exists an obligation to participate in a first discussion with the neutral. The ICC Rules provide that the parties – after designation of the neutral – shall promptly discuss, and seek to reach agreement, upon the settlement technique to be used.<sup>509</sup> Only after such discussion a party may notify the neutral of a decision no longer to pursue the ADR proceedings.<sup>510</sup> Accordingly there may be situations where the parties are required to at least attend the meeting with the neutral in order to discuss options for amicable settlement. There may be situations where parties agree upon applicability of the ICC Rules in a contract by including an ICC ADR

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<sup>507</sup> Art. 7 (4) ICC Rules.

<sup>508</sup> Art. 6 (1) ICC Rules.

<sup>509</sup> Art. 5 (1) ICC Rules.

<sup>510</sup> Art. 6 (1) (a) ICC Rules.

dispute settlement clause.<sup>511</sup> Subsequently – maybe several years later – the parties find themselves in the midst of a severe dispute. It may well be that one or more parties refuse to sit together at the negotiation table. However, in such situations, the ICC Rules request the parties to at least meet for the discussion session with the neutral.

#### 4.3.12 Mediation settlement agreement

The ICC Rules do not contain rules on the form, nature or enforcement of mediation settlement agreements. They do not state whether the neutral should be involved in the drafting of the conciliation settlement agreement. National laws must be observed.

#### 4.3.13 Judicial and arbitral proceedings

The ICC Rules do not include any provisions dealing with interaction of ADR and judicial proceedings or the influence of ADR proceedings upon the running of limitation periods. The respective national rules apply.

#### 4.3.14 Cost

The cost of the ICC ADR is composed of four elements: (i) the registration fee, (ii) administrative expenses of ICC and the (iii) fees and (iv) expenses of the neutral. The party filing the request for ADR must pay a non-refundable registration fee of US\$ 1,500.<sup>512</sup> Following the receipt of a request for ADR and the registration fee, ICC shall request the parties to pay a deposit in an amount likely to cover the administrative expenses of ICC and the fees and expenses of the neutral.<sup>513</sup> The administrative expenses of ICC for the ADR proceedings shall not exceed the maximum sum of US\$ 10,000 and shall be fixed at ICC's

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<sup>511</sup> A clause to use ICC Rules may look as follows: "In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules." For further suggestions of ICC ADR clauses see ICC Rules, Suggested ICC ADR Clauses, p. 4 et seq. available at [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr\\_rules.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/adr_rules.pdf).

<sup>512</sup> Art. 4 (1) and Appendix, Schedule of cost, A ICC Rules.

<sup>513</sup> Art. 4 (2) ICC Rules.

discretion depending on the tasks carried out by ICC.<sup>514</sup> The ICC, in consultation with the neutral and the parties, determines the fees of the neutral calculated on an hourly rate and fixes the reasonable expenses of the neutral.<sup>515</sup>

ADR proceedings proceed only after payment of the administrative expenses of the ICC and the fees and expenses of the neutral.<sup>516</sup> Upon termination of the ADR proceedings, ICC determines the total costs of the proceedings.<sup>517</sup> Costs shall be borne in equal shares by the parties.<sup>518</sup> If a party fails to pay its share, the other party may pay the unpaid balance. Otherwise ADR proceedings would come to an end. A party's other expenditure shall remain the responsibility of that party.<sup>519</sup> Payment of the neutral will be undertaken through the ICC. The parties meet with the neutral only after payment of the deposit for the neutrals fees and expenses as well as the administrative fee of the ICC.

Amounts paid to the neutral by the ICC do not include any possible value added taxes (VAT) or other taxes or charges and imposts applicable to the neutral's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such taxes or charges is a matter solely between the neutral and the parties.<sup>520</sup>

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<sup>514</sup> Appendix, Schedule of cost, B ICC Rules.

<sup>515</sup> Appendix, Schedule of cost, C ICC Rules.

<sup>516</sup> In any case where ICC considers that the deposit is not likely to cover the total costs of the ADR proceedings, the amount of such deposit may be subject to readjustment. ICC may stay the ADR proceedings until the corresponding payments are made by the parties. See Art. 4 (3) ICC Rules.

<sup>517</sup> Art. 4 (4) ICC Rules.

<sup>518</sup> Art. 4 (5) ICC Rules.

<sup>519</sup> Art. 4 (6) ICC Rules.

<sup>520</sup> Appendix, Schedule of cost, D ICC Rules.



## 4.4 LCIA mediation procedure

### 4.4.1 General

The LCIA Mediation Procedure is effective as of October 1999.<sup>521</sup> It contains detailed rules on administered mediation proceedings.

### 4.4.2 Speciality

Unless the parties agree otherwise, they may commence or to continue arbitration or judicial proceedings, next to mediation proceedings.<sup>522</sup> However, parties may not introduce, or rely upon, anything arising out of the mediation for the purposes of any arbitration or litigation.<sup>523</sup> In addition, LCIA Rules contain detailed regulations on cost including a schedule of cost according to which mediation costs are calculated on an hourly rate.<sup>524</sup>

### 4.4.3 Role of the Institution

The LCIA is highly involved in the commencement and termination of the mediation proceedings and plays a major role in the appointment of the mediator. The LCIA Court appoints the mediator as soon as practicable with due regard for any nomination, method or criteria of selection agreed in writing by the parties.<sup>525</sup>

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<sup>521</sup> LCIA Mediation Procedure (hereinafter „LCIA Rules“), available at <http://www.lcia-arbitration.com/>. Commenta on the LCIA Rules are available in Baker/Ali, A cross-comparison of institutional mediation rules in *Dispute Resolution Journal* (2002) available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_/ai\\_n9060837](http://findarticles.com/p/articles/mi_qa3923/is_/ai_n9060837).

<sup>522</sup> Art. 9 LCIA Rules.

<sup>523</sup> Art. 10 LCIA Rules.

<sup>524</sup> Art. 8 and schedule of mediation costs LCIA Rules.

<sup>525</sup> Arts 1 (4) and 2 (5) LCIA Rules.

#### 4.4.4 Scope

The LCIA Rules do not contain any restriction with regard to the subject matters of disputes that may be referred to mediation under the LCIA Rules. As mediation is an entirely consensual process the only requirement according to the LCIA Rules is that there is an agreement to mediate, and to continue to mediate once the process has begun.<sup>526</sup> In practice, mainly commercial disputes are amenable to mediation under the LCIA Rules.

#### 4.4.5 Commencement and termination

Mediation proceedings may be initiated either jointly or by one or more parties. A party wishing to commence mediation shall send to the registrar of the LCIA Court and the other parties a written request for mediation. The request for mediation shall contain (i) the personalities of the parties and their representatives (ii) a brief statement on the nature of the dispute and (iii) the value of the claim, (iv) the mediation agreement<sup>527</sup>, (v) the name of the mediator proposed and (vi) the registration fee.<sup>528</sup>

If no mediation agreement exists and the request for mediation is not made jointly by all parties to the dispute, the party receiving the request for mediation shall, within 14 days of receiving the request for mediation, advise the registrar in writing whether or not he agrees to conduct mediation proceedings.<sup>529</sup> In case the other party either declines mediation, or fails to agree to mediation

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<sup>526</sup> Arts. 1 and 2 LCIA Rules.

<sup>527</sup> The LCIA Rules contain model dispute settlement clauses. The mediation clause has the following wording: "In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause."

<sup>528</sup> Arts. 1 and 2 LCIA Rules.

<sup>529</sup> Art. 2 (3) (b) LCIA Rules.

within the prescribed period of time, there shall be no mediation under the LCIA Rules.<sup>530</sup> The registrar shall so advise the parties, in writing.<sup>531</sup>

The mediation proceedings end if (i) a settlement agreement is signed by the parties, (ii) the parties advise the mediator to terminate the mediation, (iii) the mediator advises the parties that, in his or her judgement, the mediation process will not resolve the issues in dispute or (iv) the agreed time limit for mediation has expired and the parties have not agreed to extend that time limit and (v) the parties fail to pay the advance on cost.<sup>532</sup>

#### 4.4.6 Parties

After commencement of the mediation proceedings, the parties have (unless agreed otherwise) a duty to inform the mediator about the content of the dispute and the issues to be resolved.<sup>533</sup> The parties must observe the duty to confidentiality<sup>534</sup> and undertake payment of the cost<sup>535</sup>.

#### 4.4.7 Mediator

The LCIA Court appoints the mediator after full payment of the deposit for cost.<sup>536</sup> Prior appointment by the LCIA Court, the potential mediator shall furnish a written résumé and a statement of impartiality or independence.<sup>537</sup> The potential mediator shall disclose any circumstances that are likely to give rise to any justified doubts as to his impartiality. In case a party has justified

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<sup>530</sup> Art. 2 (4) LCIA Rules.

<sup>531</sup> Art. 2 (4) LCIA Rules.

<sup>532</sup> Arts. 6 and 8 (4) LCIA Rules.

<sup>533</sup> Art. 4 LCIA Rules.

<sup>534</sup> Art. 10 LCIA Rules.

<sup>535</sup> Art. 8 LCIA Rules.

<sup>536</sup> Art. 8 (4) LCIA Rules.

<sup>537</sup> Art. 3 (1) LCIA Rules.

doubts as to the mediator's impartiality or independence, a party may object to the mediator's appointment.<sup>538</sup> In such case the LCIA Court shall appoint another mediator. The LCIA has access to a large number of experienced and highly qualified mediators (and arbitrators) from many jurisdictions.

The mediator may conduct the mediation in such manner he deems appropriate.<sup>539</sup> The mediator may communicate with the parties orally or in writing, together, or individually, and may convene a meeting at a venue to be determined by the mediator after consultations with the parties.<sup>540</sup> Each party shall notify the other party and the mediator of the number and identity of those persons who will attend the mediation proceedings.<sup>541</sup> Lacking an agreement between the parties, the mediator determines the language of the mediation proceedings.<sup>542</sup> The mediator shall at all times bear in mind the circumstances of the case and the wishes of the parties.<sup>543</sup>

The LCIA Rules do not define mediation, however, a definition may be found on the homepage of the LCIA. Accordingly, mediation is a negotiated settlement, conducted and concluded with the assistance of a neutral third-party.<sup>544</sup> The process is voluntary and does not lead to a binding decision, enforceable in its own right.

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<sup>538</sup> Art. 3 (2) LCIA Rules.

<sup>539</sup> Art. 5 (1) LCIA Rules.

<sup>540</sup> Art. 5 (2) LCIA Rules.

<sup>541</sup> Art. 5 (4) LCIA Rules.

<sup>542</sup> Art. 5 (6) LCIA Rules.

<sup>543</sup> Art. 5 (1) LCIA Rules.

<sup>544</sup> <http://www.lcia-arbitration.com/>.

#### 4.4.8 Representation

Each party shall identify a representative who is authorised to settle the dispute on behalf of that party, and shall confirm that authority in writing.<sup>545</sup> The representative must also have instructions as to the financial limit of his authority.<sup>546</sup>

#### 4.4.9 Proceedings

Unless the parties have agreed otherwise, each party shall submit to the mediator and the other party, a brief written statement summarising the case and the issues to be resolved.<sup>547</sup> Copies of any documents to which it refers should accompany the statement.<sup>548</sup> The statement shall be submitted no later than 7 days before the first meeting.<sup>549</sup>

#### 4.4.10 Confidentiality

The mediation process and all negotiations, and statements and documents prepared for the purposes of the mediation, any settlement terms and the outcome of the mediation shall be private and confidential and may not be disclosed to outsiders unless agreed by the parties.<sup>550</sup> Documents relating to the mediation will be privileged and will not be admissible in evidence or otherwise discoverable in any litigation or arbitration in connection with the dispute referred to mediation.<sup>551</sup> An exception applies to information, which

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<sup>545</sup> Art. 5 (5) LCIA Rules.

<sup>546</sup> <http://www.lcia-arbitration.com/>.

<sup>547</sup> Art. 4 (1) (3) LCIA Rules.

<sup>548</sup> Art. 4 (2) LCIA Rules.

<sup>549</sup> Art. 4 (1) LCIA Rules.

<sup>550</sup> Art. 10 (1)-(3) LCIA Rules.

<sup>551</sup> Art. 10 (4) LCIA Rules.

would in any event be admissible or discoverable in subsequent adversarial proceedings.<sup>552</sup>

Information provided to the mediator in private during the course of the mediation shall not be disclosed to the other party, without the express consent of the party providing the information.<sup>553</sup>

#### 4.4.11 Voluntariness

Mediation proceedings under the LCIA Rules are of voluntary nature.<sup>554</sup>

#### 4.4.12 Mediation settlement agreement

The parties, with the assistance of the mediator if the parties so request, may draw up and sign a mediation settlement agreement which is of binding nature.<sup>555</sup>

#### 4.4.13 Judicial and arbitral proceedings

Without an agreement to the contrary, parties may initiate or continue adversarial proceedings with respect of the subject matter of the mediation.<sup>556</sup>

#### 4.4.14 Cost

After commencement of mediation and before appointment of the mediator, the LCIA will request the parties to file equal shares of a deposit for cost.<sup>557</sup> Cost comprise of two elements, (i) the fees and expenses of the mediator and the (ii) administrative charges of the LCIA.<sup>558</sup> Any other costs incurred by the parties,

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<sup>552</sup> Art. 10 (4) LCIA Rules.

<sup>553</sup> Art. 5 (3) LCIA Rules.

<sup>554</sup> See section 4.4.5 above.

<sup>555</sup> Art. 7 LCIA Rules.

<sup>556</sup> Art. 9 LCIA Rules.

<sup>557</sup> Art. 8 (3) (4) LCIA Rules.

<sup>558</sup> Art. 8 (1) LCIA Rules.

whether in regard to legal fees, experts' fees or expenses of any other nature are not included.<sup>559</sup> At the conclusion of the mediation, the LCIA, in consultation with the mediator, will fix the costs of the mediation.<sup>560</sup> Unless agreed otherwise in writing, the costs shall be borne in equal shares by the parties.<sup>561</sup>

The LCIA Rules contain a schedule of mediation fees and expenses. Mediation costs are based on the hourly rates of the mediators and of the LCIA's administrative staff, without reference to the sums in issue. Currently, the non-refundable registration fee is £ 500. Administration fees are calculated on an hourly basis and amount to £200 per hour for assistance of the registrar, deputy registrar or counsel. Other secretariat personnel charges £ 100 per hour. Expenses include for example postage, telephone, facsimile, and room hire, catering and other support services and will be charged at the cost to the LCIA or the mediator.

Mediators' fees will be charged by hourly rates, which may vary according to the circumstances of the case and the special qualifications of the mediator. The rates will be advised by the mediator and agreed with the parties prior to the appointment of the mediator and will generally be within the range of £ 150 to £ 350 per hour. The schedule of cost further includes detailed regulations regarding charges for time reserved by the mediator but not used.

Charges may be subject to VAT at the prevailing rate.

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<sup>559</sup> Art. 8 (7) LCIA Rules.

<sup>560</sup> Art. 8 (5) LCIA Rules.

<sup>561</sup> Art. 8 (2) LCIA Rules.

## 4.5 Swiss Rules

### 4.5.1 General

The Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry were adopted in April 2007.<sup>562</sup> The Swiss Rules are available in English, German, Italian and French.

### 4.5.2 Speciality

The Swiss Rules contain provisions on the interaction between mediation and arbitration.<sup>563</sup> The Swiss Rules further determine that the rules apply in the version in force at the date the institution receives the request for mediation.<sup>564</sup>

### 4.5.3 Role of the Institution

### 4.5.4 Scope

The Swiss Rules briefly describe the essence of mediation in its pure form: "Mediation is an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the participants. Unlike an expert the mediator does not offer his or her own views *nor make proposals like a conciliator, and unlike an arbitrator he or she does not render an award.* The mediation can be terminated at any time, if the parties do not reach a mutually satisfactory settlement, or if one of the parties wants to discontinue the process."

### 4.5.5 Commencement and termination

Under the Swiss Rules a request for mediation can be submitted, if the parties have agreed, whether by a prior contractual agreement or after a problem or a

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<sup>562</sup> The Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry (hereinafter "Swiss Rules"), adopted in April 2007, available at <https://www.sccam.org/sm/en/rules.php>.

<sup>563</sup> See sections 4.5.12 and 4.5.13.

<sup>564</sup> See section 4.5.5.



dispute have arisen, to refer their dispute to mediation under the Swiss Rules.<sup>565</sup> According to article 1 (2) Swiss Rules, they apply in the version as in force at the date when the institution received the request for mediation.

Parties wishing to initiate mediation under the Swiss Rules shall submit a request for mediation to one of the six Swiss Chambers of Commerce.<sup>566</sup> The content of the request for mediation shall be (i) the personal data of the parties and their counsel, (ii) the mediation agreement, (iii) a succinct description of the dispute, including an estimate of the amount in dispute, (iv) a joint designation of the mediator or, failing an agreement, a description as to any qualifications required, (v) comments on the language of the proceedings and (vi) the registration fee.<sup>567</sup> The request for mediation and the mediation agreement shall be submitted in the working languages of the Chambers (German, French, Italian or English).<sup>568</sup> The parties shall submit the request for mediation any enclosed documents in as many copies as there are parties, as well as one copy per mediator and one copy for the Chambers.<sup>569</sup>

After receiving a request for mediation, the Chambers verify whether there exists an agreement to mediate under the Swiss Rules.<sup>570</sup> Where no prior mediation agreement exists, mediation may commence if a party files a request for mediation, pays the registration fee and the other party accepts the invitation to conduct mediation according to the Swiss Rules within 15 days after receipt of the request for mediation.<sup>571</sup> Subject to a positive answer,

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<sup>565</sup> Art 1 (1) Swiss Rules. The Swiss Rules offer various model clauses for contracts as well as clauses which can be used if a dispute has already arisen. The model clauses are available at <https://www.sccam.org/sm/en/clauses.php>.

<sup>566</sup> Art 2 (1) and Schedule A Swiss Rules.

<sup>567</sup> Art. 2 (2) Swiss Rules.

<sup>568</sup> Art. 2 (5) Swiss Rules.

<sup>569</sup> Art. 2 (3) Swiss Rules.

<sup>570</sup> Art. 3 and 4 Swiss Rules.

<sup>571</sup> Art. 5 (1)-(4) Swiss Rules.

mediation proceedings commence.<sup>572</sup> Where the parties have not all agreed on the application of the Swiss Rules, the Chambers will grant a 15-day time limit to do so.<sup>573</sup> Where the Chambers do not receive a positive response on the application of the Swiss Rules, the request for mediation is deemed to be rejected and the mediation proceedings shall not commence.<sup>574</sup>

Mediation under the Swiss Rules ends (i) upon the signing by all parties of a mediation settlement agreement putting an end to the dispute, (ii) with the written notification of a party's decision to end the mediation, (iii) upon the mediator's termination, (iv) upon expiration a time-limit set by the parties and the mediator for the resolution of the dispute, (v) in case of failure to pay the registration fee or the advance on costs.<sup>575</sup>

Upon termination of the mediation proceedings, the mediator shall promptly inform the Chamber in writing about the date of the termination and whether the mediation proceedings resulted in a full or partial settlement.<sup>576</sup> The Chamber shall confirm in writing to the parties and to the mediator the end of the mediation proceedings.<sup>577</sup>

#### 4.5.6 Parties

The parties shall be guided by fairness and respect.<sup>578</sup>

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<sup>572</sup> Art. 5 (5) Swiss Rules.

<sup>573</sup> Art. 4 (1) Swiss Rules.

<sup>574</sup> Art. 4 (3) Swiss Rules.

<sup>575</sup> Art. 20 (1), 15 (5) and 30 (3) Swiss Rules.

<sup>576</sup> Art. 20 (2) Swiss Rules.

<sup>577</sup> Art. 20 (3) Swiss Rules.

<sup>578</sup> Art. 14 (2) Swiss Rules.

#### 4.5.7 Mediator

A mediator will be appointed either by the parties' joint designation or by the competent Chamber. Where the parties have jointly designated a mediator, the Chambers shall determine whether the mediator designated by the parties may be confirmed.<sup>579</sup> Where the parties have not jointly designated a mediator, the Chambers will grant a 15-day time limit to do so.<sup>580</sup> If the parties fail to jointly designate the mediator, the Chambers shall appoint the mediator.<sup>581</sup> The Chamber proposes and nominates a mediator only if the parties do not themselves agree on a mediator.<sup>582</sup> In such case, the parties shall designate the mediator from a list of at least three names of mediators suggested by the Chamber after considering the nature of the dispute and the qualifications required.<sup>583</sup> Failing an agreement by the parties within the time limit set forth, the Chambers shall appoint the mediator from among the suggested names.<sup>584</sup>

If, within five days of the receipt of the Chambers' notice of appointment, a party objects to the appointment in writing stating reasons that are considered appropriate by the Chambers, the Chambers may promptly appoint another mediator.<sup>585</sup> The same applies if a mediator is, according to the view of all parties, no longer in a position to fulfil his duties.<sup>586</sup>

The parties may jointly designate a mediator when the request for mediation is filed. All joint designations of mediators by the parties are subject to confirmation by the Chambers, upon which the appointment shall become

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<sup>579</sup> Arts. 3 (1) and 9 Swiss Rules.

<sup>580</sup> Art. 3 (2) Swiss Rules.

<sup>581</sup> Art. 3 (3) Swiss Rules.

<sup>582</sup> Art. 8 (2) Swiss Rules.

<sup>583</sup> Art. 8 (2) Swiss Rules.

<sup>584</sup> Art. 8 (2) Swiss Rules.

<sup>585</sup> Art. 8 (3) Swiss Rules.

<sup>586</sup> Art. 10 Swiss Rules.

effective.<sup>587</sup> Prior appointment of a mediator designated by the parties, the Chamber will verify the person's ability to serve as mediator in the respective dispute. The Chambers ensure that the mediator appointed by the parties satisfies the conditions of neutrality, impartiality and independence.<sup>588</sup> The Chambers will evaluate the potential mediator's (i) agreement to serve, (ii) curriculum vitae, (iii) statement of independence and (iv) adherence to the European Code of Conduct for Mediators.<sup>589</sup> Where the mediator designated by the parties cannot be confirmed by the Chambers or refuses his designation, the Chambers shall grant a 15-day time limit to the parties for the joint designation of a new mediator.<sup>590</sup>

The Swiss Rules contain regulations regarding the appointment of one or more mediators. In general, a single mediator will be appointed.<sup>591</sup> Where the parties agree to appoint more mediators or the Chambers recommend so, the mediators shall be selected in accordance with the parties' joint wishes. Where the mediators are selected successively, the first mediator is consulted for the selection of the other mediator(s).<sup>592</sup>

After appointment and transmission of the file to the mediator, the mediator shall promptly convene the parties to a joint preliminary session.<sup>593</sup> The mediator shall - guided by fairness and respect - help the parties in their attempt to reach an acceptable and satisfactory resolution of their dispute.<sup>594</sup>

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<sup>587</sup> Art. 9 (1) Swiss Rules.

<sup>588</sup> Arts. 9 and 12 (1) Swiss Rules.

<sup>589</sup> Arts. 9 and 13 Swiss Rules.

<sup>590</sup> Art 8 (1) Swiss Rules.

<sup>591</sup> Art. 7 (1) Swiss Rules.

<sup>592</sup> Art. 7 (2) Swiss Rules.

<sup>593</sup> Art. 11 Swiss Rules.

<sup>594</sup> Art. 14 (1) and (2) Swiss Rules.

He has no authority to impose a settlement on the parties or recommend settlement options.<sup>595</sup>

#### 4.5.8 Representation

Parties shall either appear in person or through duly authorized and empowered representatives to all mediation sessions. Personal data of the attendees to mediation sessions, including counsel, shall be communicated in writing to the mediator, to the other parties and to the Chamber.<sup>596</sup> The parties may also be assisted by counsel of their choice.<sup>597</sup>

#### 4.5.9 Proceedings

The Swiss Rules provide that the parties shall first and foremost determine how mediation proceedings shall be conducted.<sup>598</sup> Failing such an agreement, the mediator shall conduct the mediation proceedings, as he deems appropriate.<sup>599</sup> The mediator shall be guided by the principles of fairness and respect and take into account the circumstances of the case, the wishes expressed by the parties, and the need for a prompt settlement of the dispute.<sup>600</sup>

With the parties' agreement, the mediator determines the (i) place of the meetings, (ii) language of the mediation, (iii) possibility of separate caucuses, (iv) timetable, if any, (v) submissions of written pleadings and documents, if any, and (vi) equal attendance by other persons.<sup>601</sup>

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<sup>595</sup> Art. 14 (1) Swiss Rules.

<sup>596</sup> Art. 19 Swiss Rules.

<sup>597</sup> Arts. 2 (2) (b) and 19 Swiss Rules.

<sup>598</sup> Art 15 (1) Swiss Rules.

<sup>599</sup> Art. 15 (1) Swiss Rules.

<sup>600</sup> Arts. 14 (2) and 15 (1) Swiss Rules.

<sup>601</sup> Art. 15 (2) Swiss Rules.

Subject to the parties' agreement, the mediator may seek expert advice on technical aspects of the dispute.<sup>602</sup> Cost for such expert advice must be borne by the parties.<sup>603</sup>

Unless otherwise agreed by the parties, the seat of the mediation is at the place of the Chamber where the request was submitted, although meetings may be held elsewhere and mediation is subject to Swiss law.<sup>604</sup>

Unless the parties have agreed to further involve the mediator in the dispute settlement procedure in another role after termination of mediation proceedings, the mediator shall destroy any document or brief in his possession 90 days after the end of the mediation proceedings.<sup>605</sup>

#### 4.5.10 Confidentiality

Unless the parties agree otherwise, mediation is private and confidential at all times.<sup>606</sup> Observations, statements or propositions made before the mediator or by him cannot be used later, even in case of litigation or arbitration.<sup>607</sup>

The mediator cannot act as arbitrator, judge, expert, or as representative or advisor of one party in any subsequent proceedings initiated against one of the parties to the mediation after the commencement of the mediation.<sup>608</sup> If the parties, however, expressly agree otherwise, and designate the mediator as arbitrator, judge or expert in any subsequent arbitral proceedings, the latter

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<sup>602</sup> Art. 15 (4) Swiss Rules.

<sup>603</sup> Art. 15 (4) Swiss Rules.

<sup>604</sup> Arts. 16 and 17 (1) Swiss Rules.

<sup>605</sup> Art. 20 (4) and 22 Swiss Rules.

<sup>606</sup> Art. 18 (1) and (2) Swiss Rules.

<sup>607</sup> Art 18 (1) Swiss Rules.

<sup>608</sup> Art. 22 (1) Swiss Rules.

may take into account information received during the course of the mediation.<sup>609</sup>

After mediation ends, neither the Chambers nor the mediator(s) or the appointed experts shall be under any obligation to make statements to any person or tribunal about any matter concerning the mediation, nor shall a party seek to make any of these persons a witness in any legal or other proceedings arising out of the mediation.<sup>610</sup>

Any information given to the mediator in separate sessions (caucuses) is confidential and will not be revealed to the other party without prior consent.<sup>611</sup>

#### **4.5.11 Voluntariness**

The Swiss Rules are based on the voluntary participation of the parties and their desire to resolve their dispute amicably.

#### **4.5.12 Mediation settlement agreement**

A settlement agreement must be in writing and signed by the relevant parties.<sup>612</sup> If the parties settle the dispute during the arbitral proceedings according to the Swiss Arbitration Rules, the arbitral tribunal shall render an award on agreed terms.<sup>613</sup>

#### **4.5.13 Judicial and arbitral proceedings**

The Swiss Rules explicitly provide for the option of a dispute settlement chain administered by the Swiss Chambers of Commerce. Where mediation fails,

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<sup>609</sup> Art. 22 (2) Swiss Rules.

<sup>610</sup> Art. 25 (2) Swiss Rules.

<sup>611</sup> Art. 15 (3) Swiss Rules.

<sup>612</sup> Art. 21 Swiss Rules.

<sup>613</sup> Art. 23 (1) Swiss Rules, Art. 34 Swiss Arbitration Rules.

parties may revert to arbitration according to the arbitration rules of the Chambers.<sup>614</sup>

Subject to an arbitration agreement, either party may initiate arbitration proceedings by submitting a notice of arbitration.<sup>615</sup>

Article 24 of the Swiss Rules contains a provision regarding a mediation-window during arbitration proceedings.<sup>616</sup> The pertinent provision of the Swiss Rules provides that where mediation appears to be worth trying, whether in whole or in part, the Chambers or the arbitrators themselves may suggest to the parties to amicably resolve their dispute, or a certain part of it, by having recourse to a mediator.<sup>617</sup> This shall be applicable in all arbitration proceedings pending before the Chambers.<sup>618</sup>

#### 4.5.14 Cost

The fees and expenses of mediation include (i) a non refundable registration fee paid by the requesting party (CHF 600) or parties (CHF 300 each) when filing the request for mediation, (ii) administrative fees, calculated as a percentage of 10 % of the mediator's fees and (iii) the mediator's fees, calculated on the basis of either an hourly rate (CHF 200 and CHF 500), or a daily rate (CHF 1.500 and CHF 2.500).<sup>619</sup> Parties may agree on another rate for the mediator's fees.<sup>620</sup>

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<sup>614</sup> Arts. 6 and 23 Swiss Rules.

<sup>615</sup> Art. 23 (1) Swiss Rules.

<sup>616</sup> Art. 24 Swiss Rules.

<sup>617</sup> Art. 24 (1) Swiss Rules.

<sup>618</sup> Art. 24 (1) Swiss Rules.

<sup>619</sup> Arts. 28 (a) and (b), 29 and Appendix B (Schedule for Cost of Mediation) Swiss Rules.

<sup>620</sup> Appendix B (Schedule for Cost of Mediation) Swiss Rules.



The chambers shall not proceed and register the mediation unless and until the registration fee is fully paid.<sup>621</sup> The mediator pays the administrative fees to the Chambers at the end of the proceedings.<sup>622</sup>

At any time during the proceedings, the mediator may request each party to deposit an equal amount as advance payment towards the costs of the mediation.<sup>623</sup>

Upon termination of the mediation, the mediator provides an invoice for his fees and costs to the parties and the Chambers.<sup>624</sup>

Unless otherwise agreed by the parties, all mediation costs shall be equally split amongst the parties, whereas the parties are jointly and severally responsible for its payment.<sup>625</sup> Personal expenses incurred by a party in relation with the mediation are borne by this party.<sup>626</sup>

#### 4.6 VIAC Conciliation Rules

##### 4.6.1 General

The VIAC Rules of Arbitration and Conciliation, often referred to as Vienna Rules,<sup>627</sup> are contained in one document and were adopted by the Extended Board of the Austrian Federal Economic Chamber on 3 May 2006, with effect from 1 July 2006. They are presently available in German, English, Russian and Czech. The conciliation rules contain six articles only and mainly regulate

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<sup>621</sup> Art. 2 (4) and Appendix B (Schedule for Cost of Mediation) Swiss Rules.

<sup>622</sup> Appendix B (Schedule for Cost of Mediation) Swiss Rules.

<sup>623</sup> Art. 30 (1) Swiss Rules.

<sup>624</sup> Art. 31 Swiss Rules.

<sup>625</sup> Art. 27 (1) Swiss Rules.

<sup>626</sup> Art. 27 (2) Swiss Rules.

<sup>627</sup> VIAC Rules of Arbitration and Conciliation, Vienna Rules, (hereinafter „VIAC Rules“). The Vienna Rules are available at [http://portal.wko.at/wk/startseite\\_dst.wk?angid=1&dstid=8459](http://portal.wko.at/wk/startseite_dst.wk?angid=1&dstid=8459).

initiation and termination of conciliation proceedings, rudimentary provisions of the procedure, form and potential nature of the conciliation settlement agreement and cost of the conciliation procedure and its interaction with arbitration proceedings. The VIAC Rules cannot be seen as stand-alone rules for mediation proceedings but are rather suitable for conciliation within the framework of arbitration proceedings.

Even though VIAC has promoted conciliation for over thirty years it must be said, however, that according to the President of the International Arbitral Centre of the Austrian Federal Economic Chamber, Melis, conciliation services have been rarely used in the past and, in addition, that the few mediation procedures which have taken place were all unsuccessful.<sup>628</sup>

#### 4.6.2 Speciality

The conciliator's role is special in two aspects. Firstly, he shall provide the parties with settlement proposals<sup>629</sup> and secondly, he may be appointed as sole arbitrator once a settlement agreement is reached.<sup>630</sup> In this regard the VIAC Rules provide for an interesting modus regarding the form of the settlement agreement. Subject to a valid arbitration agreement and request by the parties, the VIAC's board shall appoint the conciliator as sole arbitrator.<sup>631</sup> The sole arbitrator must either authenticate the settlement agreement in the form of an amicable settlement or render an award on agreed terms.<sup>632</sup>

In addition, the VIAC Rules do not contain provisions on confidentiality.

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<sup>628</sup> Melis, Arbitration in Austria, available at [http://portal.wko.at/wk/dok\\_detail\\_html.wk?AngID=1&DocID=760652&STID=361006#1](http://portal.wko.at/wk/dok_detail_html.wk?AngID=1&DocID=760652&STID=361006#1).

<sup>629</sup> Art. 3 VIAC Rules.

<sup>630</sup> Art. 4 VIAC Rules.

<sup>631</sup> Art. 4 VIAC Rules.

<sup>632</sup> Art. 4 VIAC Rules.

#### 4.6.3 Role of the institution

The VIAC Rules explicitly state three activities of the VIAC's organs during conciliation proceedings. Correspondence on initiation of the conciliation procedure shall be submitted to the VIAC's Secretariat, which is responsible for servicing it to the opposing party.<sup>633</sup> Nomination of the conciliator falls under the VIAC Board's tasks.<sup>634</sup> The Secretary General determines costs of arbitration and deposits.<sup>635</sup> Further institutional activities are not mentioned in the VIAC Rules.

Even though the VIAC Rules are available in several languages, the Centre's languages of correspondence shall be conducted in German or English.<sup>636</sup>

#### 4.6.4 Scope

The VIAC's administration competence extends to disputes involving an international element. This includes the settlement of disputes in which not all parties have their place of business or their normal residence in Austria.<sup>637</sup> Where all parties are based in Austria, the VIAC may have jurisdiction if the dispute is of international character.<sup>638</sup> The VIAC Rules do not contain a model conciliation clause.

#### 4.6.5 Commencement and termination

The party aiming at commencement of VIAC conciliation proceedings shall file a request for conciliation, addressed to the VIAC's Secretariat.<sup>639</sup> The Secretary

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<sup>633</sup> Art. 2 VIAC Rules.

<sup>634</sup> Art. 3 VIAC Rules.

<sup>635</sup> Art. 6 VIAC Rules.

<sup>636</sup> Art. 6 VIAC Arbitration Rules.

<sup>637</sup> Art. 1 (1) VIAC Arbitration Rules, Art. 1 VIAC Rules.

<sup>638</sup> Art. 1 (1) VIAC Arbitration Rules, Art. 1 VIAC Rules.

<sup>639</sup> Art. 2 VIAC Rules.

General then informs the opposing party about the request for conciliation and invites it to reply within thirty days after service of the request.<sup>640</sup> Where the opposing party fails to respond in a positive manner, the attempt to initiate conciliation proceedings is considered as having failed.<sup>641</sup> A positive response will be followed by the nomination of a conciliator.<sup>642</sup>

The VIAC Rules provide for two grounds for termination only. Conciliation proceedings are considered as having failed if (i) the opposing party does not accept participation after receiving the request for conciliation and in case (ii) no settlement agreement can be reached.<sup>643</sup>

#### 4.6.6 Parties

The parties may submit documents to the mediator and shall participate at a hearing.<sup>644</sup> Initiation of arbitration proceedings for the purpose of receiving an amicable settlement or an award on agreed terms is subject to the parties' discretion.<sup>645</sup> Parties must undertake payment of cost in due time. Further regulations regarding the parties' role in conciliation are not contained in the VIAC Rules.

#### 4.6.7 Mediator

The VIAC's Board is responsible for appointment of the conciliator. It may nominate one of its members or another qualified person.<sup>646</sup> The conciliator's tasks are briefly mentioned in article 3 VIAC Rules. He shall study the

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<sup>640</sup> Art. 2 VIAC Rules.

<sup>641</sup> Art. 2 VIAC Rules.

<sup>642</sup> Art. 3 VIAC Rules.

<sup>643</sup> Arts. 2 and 5 VIAC Rules.

<sup>644</sup> Art. 3 VIAC Rules.

<sup>645</sup> Art. 4 VIAC Rules.

<sup>646</sup> Art. 3 VIAC Rules.

documents submitted by the parties and convene a hearing. Afterwards the conciliator shall submit proposals for the amicable settlement to the parties.<sup>647</sup>

#### **4.6.8 Representation**

The VIAC Rules do not contain any provisions dealing with representation in conciliation proceedings.

#### **4.6.9 Proceedings**

Proceedings may be held in writing and orally.<sup>648</sup> There shall be at least one oral hearing where the parties meet with the conciliator.<sup>649</sup> Further regulations regarding the conduct of the conciliation proceedings or the conciliator's procedural capacity are not available.

#### **4.6.10 Confidentiality**

The VIAC Rules do not contain a regulation on confidentiality. They merely regulate that declarations made by the parties in the course of conciliation proceedings shall not bind them in subsequent arbitration proceedings.<sup>650</sup> A conciliator cannot be appointed as arbitrator in subsequent arbitration proceedings on the merits.<sup>651</sup> A provision which prohibits the parties to (i) submit information obtained during conciliation proceedings to an arbitral tribunal or a state court or (ii) nominate the arbitrator as witness in subsequent adjudicatory proceedings simply does not exist.

#### **4.6.11 Voluntariness**

The VIAC Rules are guided by the principle of voluntariness.

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<sup>647</sup> Art. 3 VIAC Rules.

<sup>648</sup> Art. 3 VIAC Rules.

<sup>649</sup> Art. 3 VIAC Rules.

<sup>650</sup> Art. 5 VIAC Rules.

<sup>651</sup> Art. 5 VIAC Rules.

#### 4.6.12 Mediation settlement agreement

A settlement agreement shall be recorded in writing and signed by the parties and the conciliator.<sup>652</sup> If so agreed by the parties, the settlement agreement may be recorded in the form of an amicable settlement or an award on agreed terms.<sup>653</sup>

#### 4.6.13 Judicial and arbitral proceedings

Rules stating that adversarial proceedings should not be initiated while the parties try to settle their dispute through conciliation are not contained in the VIAC Rules.

#### 4.6.14 Cost

Costs include cost for the VIAC's administrative activity and those of the conciliator (fees plus VAT and cost including travel and subsistence expenses).<sup>654</sup> Cost will be determined by the VIAC's Secretary General at an appropriate share of the charges applicable for arbitration proceedings.<sup>655</sup> The amount in dispute is the basis for determination of cost.<sup>656</sup>

The Secretary General may ask the parties to pay deposits against costs to an earlier stage of the conciliation proceedings.<sup>657</sup>

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<sup>652</sup> Art. 4 VIAC Rules.

<sup>653</sup> Art. 4 VIAC Rules. See section 4.6.2 above.

<sup>654</sup> Art. 6 VIAC Rules.

<sup>655</sup> Art. 6 VIAC Rules.

<sup>656</sup> Art. 6 VIAC Rules, Art. 36 (1) and Annex 1, Schedule of arbitration cost VIAC Arbitration Rules.

<sup>657</sup> Art. 6 VIAC Rules.

## 4.7 CEDR Model Mediation Procedure

### 4.7.1 General

The CEDR Rules do not contain a legal wording but are rather formulated in a way, which helps parties to understand how the mediation procedure will be conducted. The CEDR Rules explain the mediation procedure, the roles of the mediator, the parties and their advisers. CEDR Rules should be read together with CEDR Model Mediation Clause<sup>658</sup>, CEDR Code of Conduct for Mediators<sup>659</sup> and the CEDR Terms and Conditions of Business<sup>660</sup>. CEDR mediations are based on the CEDR Clause, which will be signed by the parties, the mediator and CEDR at the outset of the mediation proceedings. The CEDR Clause contains in particular regulations on the mediation procedure, authority, confidentiality and cost. The CEDR Code of Conduct for Mediators contains matters, which impinge on the mediator's ethical conduct of any mediation. CEDR Terms and Conditions of Business regulate issues related to mediation cost. With experience of over 13.000 referrals covering every dispute sector and level of complexity, CEDR's dispute resolution team has daily experience of working with parties on mediator suitability and the logistics of dispute resolution.<sup>661</sup> CEDR maintains a directory of over 150 experienced mediators covering a wide geographical and professional spectrum.<sup>662</sup>

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<sup>658</sup> CEDR Model Mediation Clause (hereinafter "CEDR Clause"), available at [http://www.cedr.com/about\\_us/library/documents.php](http://www.cedr.com/about_us/library/documents.php).

<sup>659</sup> CEDR Code of Conduct for Mediators, available at [http://www.cedr.com/about\\_us/library/documents.php](http://www.cedr.com/about_us/library/documents.php).

<sup>660</sup> CEDR Terms and Conditions of Business, available at [http://www.cedr.com/CEDR\\_Solve/services/mediation/mediation\\_services/select/terms.php](http://www.cedr.com/CEDR_Solve/services/mediation/mediation_services/select/terms.php).

<sup>661</sup> Contact details are available at [http://www.cedr.com/CEDR\\_Solve/people/](http://www.cedr.com/CEDR_Solve/people/).

<sup>662</sup> CEDR's mediator directory is available at [http://www.cedr.com/CEDR\\_Solve/services/mediation/mediation\\_services/direct/directory.php](http://www.cedr.com/CEDR_Solve/services/mediation/mediation_services/direct/directory.php).

#### 4.7.2 Speciality

CEDR offers three mediation services, differing in the involvement of CEDR's assistance during the dispute settlement procedure.<sup>663</sup> From a comprehensive recommendation and case management service to simple access to the mediator CEDR attempts to offer parties the service most adapted to their special needs.<sup>664</sup>

#### 4.7.3 Role of the institution

Depending on the mediation service chosen by the parties, the role of CEDR may range from pure advice on the suitability of the mediation or other dispute resolution processes or assistance with the selection of the mediator to administering the complete mediation proceeding. This includes, amongst others, assistance by a client adviser and case manager during the mediation, assistance with the drafting of the mediation agreement, documents advice and logistics management, arrangement of venue and dates for mediation meetings.

#### 4.7.4 Scope

Although CEDR's rules do not restrict its business to a field of law or domestic or international disputes, CEDR is specialized in commercial dispute settlement.

#### 4.7.5 Commencement and termination

Mediation may be initiated through (i) one, more or all parties (based on a mediation agreement or ad hoc), (ii) a court order or a recommendation by a judge before trial or appeal.<sup>665</sup>

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<sup>663</sup> [http://www.cedr.com/CEDR\\_Solve/services/mediation/mediation\\_services/index.php](http://www.cedr.com/CEDR_Solve/services/mediation/mediation_services/index.php).

<sup>664</sup> Description and contact details for further information on the three mediation services are available at [http://www.cedr.com/CEDR\\_Solve/services/mediation/mediation\\_services/index.php](http://www.cedr.com/CEDR_Solve/services/mediation/mediation_services/index.php).

<sup>665</sup> Sec. 2 CEDR Rules.



The mediation proceedings may end by (i) settlement of the dispute in whole or in part, (ii) one or more parties terminating the mediation proceedings, (iii) an agreed adjournment, (iv) withdrawal of the mediator in accordance with the CEDR Code of Conduct for Mediators and (v) failure to pay the mediation fees.<sup>666</sup>

#### 4.7.6 Parties

A special duty contained in the CEDR Rules is that each party will submit a case summary and the relevant documents no less than two weeks before the date set for the mediation. Parties must inform the mediator about the participants attending the mediation on their behalf.<sup>667</sup>

#### 4.7.7 Mediator

The mediator may either be appointed by the parties directly or may be nominated by CEDR.<sup>668</sup> While in practice CEDR appoints mediators from its in house staff, it – to a lesser extent – also makes appointments from its panel of CEDR accredited independent mediators.<sup>669</sup> The parties can agree on any number of mediators.<sup>670</sup> A mediator must have certain skills and experience and comply with CEDR's Code of Conduct for Mediators. The mediator is responsible for the conduct of the mediation proceedings. He shall determine the procedure in consultation with the parties.<sup>671</sup>

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<sup>666</sup> Sec. 9 CEDR Rules, CEDR's Terms and Conditions of Business.

<sup>667</sup> Sec. 3 CEDR Rules.

<sup>668</sup> Sec. 3 CEDR Rules.

<sup>669</sup> Shane/Hassan, Tips on Developing an International Mediation Practice in Rhoades/Kolkey/Chernik (ed.) Practitioners Handbook on International Arbitration and Mediation<sup>2</sup> (2007) sec. II. 4.02.

<sup>670</sup> Sec. 3 CEDR Rules.

<sup>671</sup> Sec. 7 CEDR Rules.

#### 4.7.8 Representation

According to section 3 CEDR Rules, parties will ensure that a lead negotiator is furnished with full authority to settle the dispute.<sup>672</sup> The CEDR Rules contain a description of the role of professional advisers.<sup>673</sup> Accordingly, lawyers are welcome to support their clients through exchange of information and opinion on fact, evidence and law during the mediation proceedings.<sup>674</sup> With regard to the mediation settlement agreement, professional advisers may engage in drawing up the settlement agreement and any consent order.<sup>675</sup>

#### 4.7.9 Proceedings

The CEDR Rules contain rules dealing in detail with the conduct of the mediation procedure. As per the preparation for the mediation proceedings it is foreseen to exchange case summaries and document bundles between the parties and the mediator.<sup>676</sup> Correspondence may be exchanged directly or through CEDR. There may be pre-mediation meetings if agreed so by the parties and the mediator.<sup>677</sup> When convening meetings, it should be taken into account that the venue, next to the joint meeting room, has enough room enabling each party to hold consultations in private.<sup>678</sup> It is not foreseen to provide for verbatim recording or transcript of the mediation proceedings. Parties can agree on appointing an independent neutral expert to advise the mediator on technical matters.<sup>679</sup>

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<sup>672</sup> Sec. 3 CEDR Rules.

<sup>673</sup> Sec. 7 CEDR Rules.

<sup>674</sup> Sec. 7 CEDR Rules.

<sup>675</sup> Sec. 7 CEDR Rules.

<sup>676</sup> Sec. 4 CEDR Rules.

<sup>677</sup> Sec. 4 CEDR Rules.

<sup>678</sup> Sec. 7 CEDR Rules.

<sup>679</sup> Sec. 3 CEDR Rules.

#### 4.7.10 Confidentiality

CEDR's Clause, which will be signed by the parties and the mediator at the outset of mediation proceedings, provides that the mediation proceedings including the facts and terms of mediation settlement agreement are confidential.<sup>680</sup> The duty to confidentiality extends to the parties, the mediator and CEDR.<sup>681</sup> The parties may agree in writing to amend provisions on confidentiality. Documents brought into existence for the purpose of the mediation are confidential and may only be used in subsequent adversarial proceedings if they could have been obtained otherwise.<sup>682</sup> Private notes cannot be disclosed to third parties or subsequent litigation or arbitration.<sup>683</sup> During mediation proceedings parties may indicate that the mediator (or CEDR) must treat certain documents confidential, which will then not be circulated without express authority.<sup>684</sup>

#### 4.7.11 Voluntariness

In general, mediation under the CEDR Rules is a voluntary process. However, the CEDR Rules acknowledge that there may be situations where the law provides for elements of compulsion by a court order or a recommendation by a judge before trial or appeal.<sup>685</sup>

#### 4.7.12 Mediation settlement agreement

The mediator will facilitate the drawing up of any settlement agreement, though the lawyers representing each of the parties normally do the drafting.<sup>686</sup>

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<sup>680</sup> Sec. 8 CEDR Rules, Sec. 5 CEDR Clause.

<sup>681</sup> Sec. 8 CEDR Rules.

<sup>682</sup> Sec. 5 CEDR Rules.

<sup>683</sup> Sec. 7 CEDR Rules.

<sup>684</sup> Sec. 5 CEDR Rules.

<sup>685</sup> Sec. 2 CEDR Rules.

<sup>686</sup> Sec. 9 CEDR Rules.

Further rules dealing with form, nature and enforcement of mediation settlement agreements are not contained in the CEDR Rules.

#### **4.7.13 Judicial and arbitral proceedings**

Any contemplated or existing litigation or arbitration in relation to the subject matter of the mediation may be started or continued despite the mediation procedure, unless the Parties agree otherwise or a court order to the contrary.<sup>687</sup>

#### **4.7.14 Cost**

Apart from the general statement that the parties pay CEDR's and the mediator's fees and expenses<sup>688</sup>, the CEDR Rules do not contain regulations on cost. Both documents refer to CEDR's Terms and Conditions of Business, which contain detailed regulations in this regard.<sup>689</sup> CEDR Terms and Conditions of Business regulate payment, invoicing, cancellation or postponement, expenses and VAT. Mediation cost contain an instruction fee of £ 250 per party plus the mediation fee based on an hourly rate of between £ 200 and £ 500 (excluding VAT and expenses), split between the parties.<sup>690</sup> The hourly rate is based upon several aspects of the mediation proceeding, taking into account, in particular, the number of parties involved, the amount in dispute and the seniority of mediator.

### **4.8 MEDAL International Mediation Rules**

#### **4.8.1 General**

The MEDAL Rules contain an elaborate set of Rules on the mediation procedure.

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<sup>687</sup> Sec. 12 CEDR Clause.

<sup>688</sup> Sec. 4 CEDR Rules, Sec. 10 CEDR Clause.

<sup>689</sup> Sec. 4 CEDR Rules, Sec. 10 CEDR Clause.

<sup>690</sup> [http://www.cedr.com/CEDR\\_Solve/services/mediation/mediation\\_services/select/fees.php](http://www.cedr.com/CEDR_Solve/services/mediation/mediation_services/select/fees.php).

#### 4.8.2 Speciality

If parties wish the appointment of a mediator through a MEDAL member organization, the institution will provide the parties with a list of three potential candidates which – according to the institution's view – have the necessary qualification to act as mediator.<sup>691</sup> Having member organizations in five countries<sup>692</sup> MEDAL has access to 300 distinctive professionals from 40 nations.<sup>693</sup> Consequently parties wishing to settle their dispute through administered mediation may receive the support of an international team of experts. During the selection process, the MEDAL member organization will further consider the nationalities of the parties, the language and place of the mediation and the subject matter of the dispute.<sup>694</sup> The MEDAL Rules should always be read in connection with the respective MEDAL member organisation's rules and practices, which is responsible for administering the mediation proceedings. Therefore, as per an example and where appropriate in this chapter, there will be a reference to the specific rules of ADR Center, the MEDAL member organization based in Italy,

The mediator may – upon request by the parties – submit his settlement recommendations to the parties.<sup>695</sup>

#### 4.8.3 Role of the institution

If the parties express a preference to mediate in another MEDAL member organization's country, the MEDAL member organization may transfer

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<sup>691</sup> Art. 5 MEDAL Rules. See section 4.8.7 below.

<sup>692</sup> United States - JAMS – ([www.jamsadr.com](http://www.jamsadr.com)), France - CMAP – ([www.mediationetarbitrage.com](http://www.mediationetarbitrage.com)), The Netherlands - ACB – ([www.acbmediation.nl](http://www.acbmediation.nl)), United Kingdom - CEDR – ([www.cedr.co.uk](http://www.cedr.co.uk)), Italy - ADR Center – ([www.adrcenter.it](http://www.adrcenter.it)).

<sup>693</sup> <http://www.adrcenter.com/international/medal.html>.

<sup>694</sup> Art. 5 MEDAL Rules. See section 4.8.7 below.

<sup>695</sup> Art. 9 MEDAL Rules. See section 4.8.7 below.

responsibility for administering the mediation to such MEDAL member organisation.<sup>696</sup>

#### 4.8.4 Scope

According to article 1 MEDAL Rules, the MEDAL Rules apply where the parties seek the amicable settlement of a dispute and agree to application of the MEDAL Rules.<sup>697</sup> There are no further requirements or restrictions regarding the subject matter of the dispute. Neither is there a requirement that the parties have their seat in different countries or that the dispute is otherwise international in its character. However, taken from the field of expertise of the MEDAL member organizations it seems that the MEDAL Rules will mainly be referred to by parties of a commercial dispute. As per an example, ADR Center administers disputes related to the commercial field, including corporate, banking and financial, commercial, employment, construction, communications, insurance, medical accountability, intellectual property, and international disputes. ADR Center's files of expertise however also include settlement of family disputes.<sup>698</sup>

#### 4.8.5 Commencement and termination

Parties wishing to initiate mediation proceedings according to the MEDAL Rules must send a written request for mediation to a MEDAL member organization.<sup>699</sup> The request for mediation should contain (i) contact details of the parties and their counsel, (ii) a brief statement of the nature of the dispute and (iii) a joint nomination of a mediator (where all parties file the request or mediation) and (iv) (where not all parties jointly submit the request for mediation) a statement whether the MEDAL member organisation shall invite the opposing party to

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<sup>696</sup> Art. 17 MEDAL Rules.

<sup>697</sup> Art. 1 MEDAL Rules.

<sup>698</sup> [http://www.adrcenter.com/focus\\_areas.html](http://www.adrcenter.com/focus_areas.html).

<sup>699</sup> Art. 2 MEDAL Rules.

participate in mediation.<sup>700</sup> The opposing party shall respond within a period of 30 days from the date of delivery of the request for mediation whether to participate in mediation.<sup>701</sup>

Mediation proceedings may come to an end due to (i) withdrawal of a party, (ii) termination by the mediator, (iii) conclusion of a written mediation settlement agreement.<sup>702</sup>

For initiating ADR Center's administration of mediation proceedings parties may download and complete a form requesting that the ADR Center invites the counterpart(s) to engage in an effort to resolve their dispute through mediation.<sup>703</sup> If all the parties to a dispute agree or there is a contractual clause providing for mediation, parties may initiate mediation by contacting the case management service. If all parties accept ADR Center's proposal to start mediation, mediation proceedings begin.

#### 4.8.6 Parties

A special duty under the MEDAL Rules is that parties shall immediately inform the mediator and the other representatives in writing about termination.<sup>704</sup>

#### 4.8.7 Mediator

The mediator may either be appointed jointly or with assistance of the MEDAL member organization.<sup>705</sup> Based upon considerations including the nationalities of the parties, the language in which the mediation will be conducted, the place of the mediation, any substantive expertise that may be required or helpful, the

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<sup>700</sup> Arts. 3 and 4 MEDAL Rules.

<sup>701</sup> Art. 3 MEDAL Rules.

<sup>702</sup> Art. 19 MEDAL Rules.

<sup>703</sup> Forms are available at [http://www.adrcenter.com/rules\\_forms/forms.html](http://www.adrcenter.com/rules_forms/forms.html). The appropriate form can be e-mailed to [casemanagement@adrcenter.it](mailto:casemanagement@adrcenter.it), or faxed to +39 06 6938.0004.

<sup>704</sup> Art. 19 MEDAL Rules.

<sup>705</sup> Art. 5 MEDAL Rules.

availability of the mediator and any known conflict of interests as well as the subject matter of the dispute, the MEDAL member organization delivers the parties a list of at least three qualified mediators.<sup>706</sup> The MEDAL member organization appoints the mediator in light of the parties' preferences.<sup>707</sup> Unless the parties agree otherwise, the MEDAL member organization appoints one mediator.<sup>708</sup>

The mediator must render a statement of independence and impartiality. He must in particular confirm that he has no financial or personal interest in the outcome of the mediation.<sup>709</sup> The independence, impartiality, and neutrality of ADR Center's professionals are guaranteed through application of the European Code of Conduct for Mediators.<sup>710</sup> All ADR Center professionals must adhere to the European Code of Conduct. A party may object to appointment of the mediator. In such case, the MEDAL member organisation shall replace the mediator.<sup>711</sup>

The mediator determines date, time and place of the mediation.<sup>712</sup> The mediation meetings will be convened at the MEDAL member organization's office most convenient to the parties.<sup>713</sup> The mediator may conduct the mediation in such a manner as he deems fit. He shall take due regard of the circumstances of the case, the wishes of the parties, and the need for a speedy

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<sup>706</sup> Art. 5 MEDAL Rules.

<sup>707</sup> Art. 5 MEDAL Rules.

<sup>708</sup> Art. 5 MEDAL Rules.

<sup>709</sup> Art. 6 MEDAL Rules.

<sup>710</sup> [http://www.adrcenter.com/rules\\_forms/code\\_conducts.html](http://www.adrcenter.com/rules_forms/code_conducts.html). The European Code of Conduct for Mediators is available at [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf).

<sup>711</sup> Art. 6 MEDAL Rules.

<sup>712</sup> Art. 8 MEDAL Rules.

<sup>713</sup> Art. 8 MEDAL Rules.



settlement of the dispute.<sup>714</sup> Upon written request by the parties, the mediator may make oral or written mediation settlement recommendations.<sup>715</sup>

#### 4.8.8 Representation

Natural parties and legal entities may be represented by counsel or any other person with full authority to settle the dispute.<sup>716</sup> The MEDAL Rules highly recommended representation by counsel.<sup>717</sup>

#### 4.8.9 Proceedings

Mediation meetings may be held in joint and separate sessions.<sup>718</sup> They are private and may only be attended by third parties, after permission of the parties and the mediator.<sup>719</sup>

ADR Center employs case managers, which are at the disposal of parties to mediation.<sup>720</sup> Case managers support the parties at the initiation and during the mediation proceedings. Contacting the counterparty, organizing preliminary meetings, coordinating logistics, supporting the mediator and the parties with document management are the case managers main tasks.<sup>721</sup>

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<sup>714</sup> Art. 9 MEDAL Rules.

<sup>715</sup> Art. 9 MEDAL Rules.

<sup>716</sup> Art. 7 MEDAL Rules.

<sup>717</sup> Art. 7 MEDAL Rules.

<sup>718</sup> Art. 9 MEDAL Rules.

<sup>719</sup> Art. 10 MEDAL Rules.

<sup>720</sup> [http://www.adrcenter.com/adr\\_center/advisers.html](http://www.adrcenter.com/adr_center/advisers.html). ADR Center further employs client advisers. Client advisers main tasks are to related to dispute prevention and include organization of presentations, lectures and trainings related to dispute resolution as well as assistance with the drafting the mediation agreement.

<sup>721</sup> [http://www.adrcenter.com/adr\\_center/case\\_managers.html](http://www.adrcenter.com/adr_center/case_managers.html).

#### 4.8.10 Confidentiality

The MEDAL member organization's staff, the mediator, the parties, their counsels and experts adhere to the strictest duty of confidentiality, instituted by the MEDAL Rules. The Rules do not permit disclosure of any element that may identify the parties to mediation, nor any specific information about the dispute itself, without the parties' consent. The mediator as well as the MEDAL member organization's staff may not testify or give evidence with regard to the mediation proceedings in any adversary proceeding.<sup>722</sup> The parties and everyone present at the mediation - including counsel and experts - will maintain the confidentiality of the mediation and will not rely upon, or introduce as evidence in any arbitral, judicial or other proceeding: (i) views expressed or suggestions or offers made by another party or the mediator in the course of the mediation proceedings, (ii) admissions made by another party in the course of the mediation proceedings, or (iii) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by another party or by the mediator.<sup>723</sup>

Exceptions to the duty of confidentiality apply if (i) all parties consent to the disclosure, (ii) the mediator is required under the general law to make disclosure, (iii) the mediator reasonably considers that there is a serious risk of significant harm to the life or safety of any person if the information in question is not disclosed or (iv) the mediator reasonably considers that there is a serious risk of his being subject to criminal proceedings unless the information in question is disclosed.<sup>724</sup> Facts, documents or other things otherwise admissible in evidence in any arbitral, judicial or other proceedings, will not be rendered inadmissible by reason of their use in the mediation.<sup>725</sup> Unless all parties agree in writing, the mediator may not act as an arbitrator or as a representative of, or

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<sup>722</sup> Art. 11 MEDAL Rules.

<sup>723</sup> Art. 11 MEDAL Rules.

<sup>724</sup> Art. 11 MEDAL Rules.

<sup>725</sup> Art. 11 MEDAL Rules.

counsel to, a party in any arbitral or judicial proceedings relating to the dispute that was the subject matter of the mediation.<sup>726</sup>

#### 4.8.11 Voluntariness

Mediation is a voluntary procedure under the MEDAL Rules.

#### 4.8.12 Mediation settlement agreement

Mediation settlement agreements shall be in writing and signed by the parties.<sup>727</sup> Mediation settlement agreements bind the parties.

#### 4.8.13 Judicial and arbitral proceedings

The parties undertake not to initiate, during the mediation, any adversarial proceedings in respect of the subject matter of the mediation proceedings.<sup>728</sup>

An exception applies if a party wants to initiate arbitral or judicial proceedings when, in its opinion, such proceedings are necessary for protection of their rights or in order to prevent expiration of limitation periods.<sup>729</sup>

The MEDAL Rules contain a clause on governing law and jurisdiction, according to which the laws of the MEDAL member organization, which administers the mediation, shall govern the mediation proceedings.<sup>730</sup> The courts of the state of such MEDAL member organization shall have exclusive jurisdiction to settle any claim, dispute or matter of difference, which may arise out of or in connection with the mediation.<sup>731</sup>

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<sup>726</sup> Art. 15 MEDAL Rules.

<sup>727</sup> Art. 20 MEDAL Rules.

<sup>728</sup> Art. 16 MEDAL Rules.

<sup>729</sup> Art. 16 MEDAL Rules.

<sup>730</sup> Art. 18 MEDAL Rules.

<sup>731</sup> Art. 18 MEDAL Rules.

#### 4.8.14 Cost

Despite the statement the mediation cost will be divided equally between the parties to the mediation,<sup>732</sup> the MEDAL Rules do not contain further provisions on cost. The MEDAL member organizations rules will apply.

According to the ADR Center's practice, the fees can either be (i) fixed or (ii) "on success" at the option of the client.<sup>733</sup> The fixed fee is predetermined on the basis of the value and of the length of the procedure. With the "on success" fee there is no cost for the parties if they do not reach any agreement. A fee schedule is not available online. Parties wishing to find out more about the fees may contact ADR Center.<sup>734</sup> Fees are paid to ADR Center, not to the mediator directly.

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<sup>732</sup> Art. 14 MEDAL Rules.

<sup>733</sup> [http://www.adrcenter.com/rules\\_forms/costs.html](http://www.adrcenter.com/rules_forms/costs.html).

<sup>734</sup> ADR Center, Via del Babuino 114, 00187 Roma, Tel. +39 06 6938.0004, Fax +39 06 6919.0408, e-mail: [info@adrcenter.it](mailto:info@adrcenter.it).

## 5. Conclusion

Currently, the European marketplace for mediation is still not mature. Though there is a favourable context through institutional and statutory regulations, commercial mediation has still a long way to go until it will be recognized as alternative to adversarial proceedings in Europe. However, due to an increasing amount of statutory and institutional rules, mediation will be taken into consideration by an increasing number of judges, attorneys and parties in dispute and is expected to expand significantly over the coming years.

Through the recent efforts of national authorities and court the legal environment has clearly become more "mediation friendly". A number of institutions propose quality mediation services provided by well-trained and experienced mediators. The list of institutions offering alternative dispute settlement services, including mediation, is continuously growing and can be found all over the world. They have done an enormous amount of work to take the theory and practice of mediation out into the world of dispute settlement. The institutions described in this paper are thoroughly of an international character, providing efficient, flexible and impartial assistance in dispute resolution proceedings for all parties, regardless of their location, and under any system of law. Parties may have complete confidence in its international credentials and in its impartiality. The structure and style of the rules is to provide a general framework for mediation proceedings open to be fashioned according to the needs of the parties in every individual case. While the institutional rules have many similarities, they also differ in significant ways. These differences illustrate the approach of each Institution and provide useful points of comparison. Parties should before selecting the institution fully evaluate these differences. However, institutional rules cannot be read without considering the applicable national and international provisions on mediation. Austrian and European law are on the path towards providing for an eminent tool regulating basic procedural aspects of the mediation procedure, including amongst others detailed regulations on the suspension of limitation periods through mediation and confidentiality of the mediation procedure. However,

there remain important issues relating to mediation, which are neither contained in statutory, nor in institutional rules or are only regulated rudimentarily. This is the case for example with regard to mandatory mediation or confidentiality between the parties. Indeed the issue of enforcement must be mentioned as well. Therefore, parties wishing to settle their disputes through mediation must – next to statutory and institutional rules – bear a broader picture of mediation in mind. Mediation cannot be seen as an isolated island in the sea, it must be considered as part of the dispute settlement world. Who thinks of mediation must at the same time consider issues relating to arbitration, litigation, the applicable substantive and procedural law, enforcement of a mediation settlement agreement, subsequent adversarial proceedings where mediation fails and many other issues.

## **6. Annex**

### **6.1 Laws**

#### **6.1.1 Mediation Act<sup>735</sup>**

##### **Section I**

##### **General Provisions**

##### **Term**

##### **Article 1**

(1) Mediation is an activity voluntarily entered into by the Parties, whereby a professionally trained neutral facilitator (Mediator) using recognised methods systematically encourages communication between the Parties, with the aim of enabling the Parties to themselves reach a resolution of their dispute.

(2) Mediation concerning civil law matters is mediation to resolve conflicts for which decisions the civil courts would be responsible.

##### **Instrument of regulation**

##### **Article 2**

(1) This Federal Law regulates the establishing of an Advisory Council for Mediation, the conditions and procedure for the registration of persons in the List of Registered Mediators, the maintaining of that List, the conditions and procedure for the registration of training institutions and courses for mediation in civil law cases, the maintaining of that List, the rights and obligations of the registered mediators as well as the suspension of limitation periods by mediation in civil law matters.

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<sup>735</sup> The translation of the Mediation Act is copied from Melis, Arbitration in Austria, available at [http://portal.wko.at/wk/dok\\_detail\\_html.wk?AngID=1&DocID=760652&STID=361006](http://portal.wko.at/wk/dok_detail_html.wk?AngID=1&DocID=760652&STID=361006).

(2) This Federal Law does not interfere with the lawfully regulated rights and obligations of those persons belonging to freelance professions, even where the exercise is within the context of an employment relationship, nor does it interfere with the statutory regulated activities of employees of youth welfare organisations. The same applies to the requirements for the carrying out of the profession and the activities of the probation service in criminal cases as well as to the application of conflict regulators in out of court settlement of criminal offences as per article 90g Section 3 StPO and article 29a BewHG.

## Terms

### Article 3

(1) As far as in this Federal Law

1. *reference is made to mediation*, this shall mean mediation in civil law matters;

2. *reference is made to a mediator*, this shall mean the registered mediator (male or female);

3. *gender-related terms only quoted in the male form* shall refer to men and women equally.

(2) Where *reference is made to a specified person at the time of the execution of this Federal Law* the appropriate gender-related address shall be used.

## Section II

Advisory Council (Beirat) for Mediation at the Federal Ministry of Justice

Establishment of the Advisory Council (Beirat)

### Article 4

(1) To advise the Federal Minister of Justice in matters concerning mediation an Advisory Council shall be established.

(2) The Federal Minister of Justice shall nominate the members and substitute members for the period of five years. A repeated nomination is possible. In



preparation for the nomination the Federal Minister of Justice shall obtain recommendations

1. for twelve members (substitute members) of representative associations in the field of mediation;

2. for a member (substitute member) of each of the following

a) from the Berufsverband Österreichischer Psychologinnen und Psychologen, of the Österreichischer Bundesverband für Psychotherapie as well as the Vereinigung der österreichischen Richter,

b) from the Minister for Education, Science and Culture (Bundesministerin für Bildung, Wissenschaft und Kultur), the Minister for Health and Women (Bundesministerin für Gesundheit und Frauen), the Minister for Social Security and Consumer Protection (Bundesminister für soziale Sicherheit, Generationen und Konsumentenschutz) as well as the Minister for Economics and Labour (Bundesminister für Wirtschaft und Arbeit),

c) from the Bundesarbeitskammer, Wirtschaftskammer Österreich, Österreichische Notariatskammer, Österreichischer Rechtsanwaltskammertag, Kammer der Wirtschaftstreuhänder as well as Bundeskammer der Architekten und Ingenieurkonsulenten;

3. for two members (substitute members) from the area of academic doctrine and research in the field of mediation of the Österreichische Rektorenkonferenz.

(3) Representative in terms of Section 2 subsection 1 is an association to which, taking into account its professional scope of functions, belong a significant number of members working in mediation, and which acts nationally or in a predominant part of the federal territory.

(4) The recommendations should, if possible, include those persons who have practical experience or theoretical skills in the field of mediation. To be considered is the representation of the needs of those who participate in mediation, or who are especially suitable.

## Duties and Responsibilities of the Advisory Council (Beirat)

### Article 5

The duties of the Advisory Council shall be

1. the discussion of issues and questions which have been submitted to it by the Federal Minister of Justice, as well as the giving of Statements of Opinion and the issuance of Expert Reports,
2. the participation in the passing of regulations pursuant to articles 29 and 30,
3. the participation in the procedure concerning registration of training institutions and courses (articles 24, 25 and 28) as well as
4. through its Board (Ausschuss), the participation in the procedure concerning registration in the List of Mediators (articles 12 to 14).

### Meetings of the Advisory Council (Beirat)

### Article 6

- (1) The Federal Minister of Justice shall act as chairman of the Advisory Council and shall summon it to meetings. At such meetings he may be represented by a civil servant of the Federal Ministry of Justice.
- (2) The meetings of the Advisory Council shall not be public. A quorum is established if at least half the members are present. The chairman shall not have voting rights.
- (3) The Advisory Council shall make its decisions by simple majority. In the event of an equality of votes a recommendation or application shall be dismissed. On the passing of a resolution of the Advisory Council, the voting members in the minority shall have the right to add their opinion to the resolution in writing.
- (4) The activity of the members of the Advisory Council is honorary. They are entitled to reimbursement of necessary cash expenditure including the costs for

travelling and accommodation appropriate to Gebührenstufe 3 of the Reisegebührenvorschrift 1995, BGBl. No. 133.

## The Board (Ausschuss) for Mediation

### Article 7

(1) The Advisory Council (Beirat) shall, from its members who are entitled to vote for the period of five years, elect a Board (Ausschuss) consisting of five members together with substitute members, as well as nominate a chairman and his substitute. The period of office ends with the appointment of a new Board. If a member or its substitute member has resigned, the Board shall elect a substitute for the rest of the period of office.

(2) The chairman shall summon the members of the Board to the meetings at the request of the Federal Minister of Justice. Article 6 Section 2, first and second sentence, as well as Section 3 shall apply. The members are entitled to reimbursement of their expenses appropriate to their activities (article 30).

## Section III

### The List of Mediators

#### Maintenance of the List

### Article 8

The Federal Minister of Justice shall maintain a List of Mediators. In the list shall be shown the first and last name, date of birth, the identification of the other profession of the mediator, his professional address and his academic title. If the mediator gives his professional field of activity or his professional fields of activities, these shall also be included in the list. The List of Mediators shall be published electronically in an appropriate way.

#### Requirements for Registration

### Article 9

(1) Entitled to registration in the List of Mediators is any person who proves that

1. he is over the age of 28,
2. he is professionally qualified,
3. he is trustworthy and
4. he has taken out professional liability insurance in accordance with article 19.

(2) The applicant for registration shall identify in his application the premises at which he practises mediation.

### Professional Qualification

#### Article 10

(1) Professionally qualified is any person who, on the basis of appropriate training (article 29) is in possession of knowledge and skills of mediation and who is also familiar with its legal and psychosocial basic principles. The training shall be completed in training courses and practical workshops of those institutions, including the universities, which the Federal Minister of Justice has registered in the list of training institutions for mediation in civil law matters.

(2) The assessment of the professional qualification shall take into account the knowledge gained by and the level of completion of qualification of the members of specified professions, in particular Psychotherapists, Clinical Psychologists and Health Psychologists, Lawyers, Notaries, Judges, State Prosecutors, Accountants, Civil Engineers, Consultants, Social Workers, Management Consultants, or Secondary School Teachers, in the course of their own training and their professional practice and which may assist in their practice of Mediation.

### Application for Registration

#### Article 11

(1) The procedure for registration in the List of Mediators is initiated on the basis of the written request of the applicant to the Federal Minister of Justice. The application shall provide the information required by article 8.

(2) The requirements of articles 9 and 10 are to be evidenced by appropriate documents, such as references, confirmations and professional certificates. The trustworthiness of the applicant, in so far as it is not a legal requirement of the other professional activity of the applicant, is to be proven by a criminal records statement, which is no older than three months, and which confirms that there has been no conviction which might lead to doubts as to the reliability of practice as a mediator.

(3) In the application shall be included a description of previous professional activities as well as the training undertaken to become a mediator, including a list of the institutions where the training has been completed.

#### Verification of Requirements

##### Article 12

(1) The Federal Minister of Justice shall first verify, on the basis of the application and its attachments, whether the requirements of article 9 Section 1 subsection 1, 3 and 4 and Section 2 concerning the applicant have been complied with, and whether the documents and certificates necessary for the verification of the requirement in accordance with article 10 are included with the application. If necessary he shall summon the applicant to submit additional documents within a reasonable time limit. The unjustified non-compliance with this summons amounts to a withdrawal of the application.

(2) If the requirement of article 10 is obviously not met, then the Federal Minister of Justice may obtain an opinion from the Board of Mediation.

(3) The Federal Minister of Justice and the Board may summon the applicant to a hearing. The unjustified non-compliance with the summons amounts to a withdrawal of the application.

#### Registration

##### Article 13

(1) Those persons who fulfil the requirements for registration in the List shall be registered by the Federal Minister of Justice for the period of five years, with

the date of the end of the period being identified. Persons not meeting the requirements shall be informed by formal Decision that they shall not be included in the List.

(2) The mediator may, at the earliest one year and at the latest three months, before termination of the registration period, apply in writing for the continuation of the registration for another ten years. He remains registered in the List until the decision concerning the request filed in due time is made known. Renewed applications to continue the registration for a period of a further ten years are admissible.

(3) In the application for continuation of the registration the mediator shall demonstrate his further training (article 20). The registration shall be maintained if the professional qualification is guaranteed by attendance at further training programmes and if none of the other requirements of article 14 apply. To verify the requirements of continuance of the registration the Federal Minister of Justice may confer with the Board.

#### Removal from the List

#### Article 14

(1) The Federal Minister of Justice shall, if necessary after obtaining an opinion from the Board for Mediation, by a formal Decision remove the mediator from the List if he becomes aware that a requirement of article 9 has ceased to be met or has not been confirmed, the mediator has not attended to his duties in accordance with article 20 or he has despite warnings grossly or repeatedly violated his duties.

(2) Furthermore, the mediator shall be removed from the list in the case of his resignation, his decease or because of the expiration of the time limit (article 13).

(3) In the case of a removal the previous registration shall be kept on the record.

#### Section IV

## Rights and obligations of registered Mediators

### General rights and obligations

#### Article 15

(1) Whoever is registered in the List of Mediators is

1. entitled to the designation “registered mediator”;
2. obliged to carry this designation when practising mediation.

(2) The mediator shall not receive or promise reimbursement, nor have it guaranteed to him, for the provision or recommendation of persons for mediation. Legal acts which violate this prohibition are void. Payments arising out of such legal dealings may be reclaimed.

### Obligations towards the Parties

#### Article 16

(1) A person who himself is or has been party, party representative, counsellor or decision-making body in a conflict between the parties, may not act as a mediator in the same conflict. Likewise, a mediator may not represent advice or decide in a conflict which makes reference to the mediation. However, after the end of the mediation with the approval of all affected parties he may act within the scope of his other professional competences to implement the result of the mediation.

(2) The mediator may only act with the approval of the parties. He shall clarify to the parties the character and the legal consequences of mediation in civil law matters and execute this to the best of his knowledge, in person, directly and impartially towards the parties.

(3) The mediator shall refer the parties to counselling needs, particularly in respect of legal issues which result in the context of the Mediation, as well as refer to the form required for the drawing up of the result of the mediation in order to ensure the implementation thereof.

## Article 17

(1) The mediator shall document the beginning, the circumstances which indicate whether the mediation procedure has been properly followed, as well as the end of the mediation. As the beginning of the mediation, the date on which the parties agreed to resolve the conflict by mediation shall be the applicable date. The mediation ends if one of the parties or the mediator no longer wishes to proceed or if a result is obtained.

(2) On request of the parties the mediator shall in writing record the result of the mediation as well as the steps necessary for the implementation.

(3) The mediator shall keep his records for at least seven years after the termination of the mediation. On request of the parties he shall deliver a true copy of the records to them.

## Secrecy, Confidentiality

## Article 18

The mediator is obliged to secrecy about the facts which he has become aware of in the course of the mediation or which have otherwise become known. He shall deal with documents provided or delivered to him in the course of the mediation confidentially. The same applies to the supporting staff of the mediator as well as to persons who act for a mediator, under his direction in the course of a practical training.

## Liability Insurance

## Article 19

(1) The mediator shall conclude professional liability insurance with an insurer who is entitled to carry on business operations in Austria to cover any claims for damages which result from his activity and shall maintain it during the period of his registration in the List of Mediators.

(2) For the insurance contract the following must apply:

1. Austrian law must be applicable;



2. A minimum insurance cover for each insurable matter shall be EUR 400,000;

3. the exclusion or a time limitation of the continuing liability of the insurer is not permissible.

(3) The insurers are obliged to notify the Federal Minister of Justice unbidden and immediately of any circumstance which means/or may mean a termination or restraint of the insurance cover or an aberration from the original insurance certificate, and they shall provide information about such circumstances on demand of the Federal Minister of Justice. The mediator shall at all times be capable of evidencing the existence of the liability insurance.

#### Continuing Education

##### Article 20

The mediator shall appropriately undertake continuing professional education, of at least fifty hours within a period of five years and evidence this to the Federal Minister of Justice every five years.

#### Notification duties

##### Article 21

The mediator shall notify the Federal Minister of Justice immediately of any change of circumstances which concern his registration in the List of Mediators. The registration shall be changed accordingly.

#### Section V

#### Suspension of time limits

##### Article 22

(1) The beginning and the proper continuation of the mediation by a registered mediator suspends the application of the start and running of the statute of limitations as well as other time limits concerning rights and claims which are affected by the mediation.

(2) The parties may agree in writing that the suspension also includes other claims which exist between them and which are not affected by the mediation. If the mediation affects rights and claims of family law the suspension then covers all mutual claims, or other perceived rights and claims at family law the parties may have against each other, even without a written agreement, insofar as the parties do not agree otherwise in writing.

## Section VI

### Training Institutions and Courses

#### Maintaining of the list of training institutions and courses

##### Article 23

The Federal Minister of Justice shall maintain a list of training institutions and courses in the area of mediation in civil law matters. The list shall be published electronically in an appropriate way. Out of date entries may be deleted from the electronic publication.

#### Registration in the list

##### Article 24

(1) The procedure for registration of a training facility or course for mediation in civil law matters shall be made on the basis of the written request of the applicant to the Federal Minister of Justice. The application may also refer to sections or particular areas of training.

(2) The applicant shall identify the content of the training, the quantity and qualification of the training personnel and the financing of the facility or the course. With regard to a training facility it shall be proven that the sustainability of the training activity is guaranteed.

(3) If the achievement of the training goals is guaranteed on the strength of the evidence of the applicant, as well as, in the case of a training facility, the sustainability of its activity, the Federal Minister of Justice shall, if necessary after consultation with the Advisory Council, register the training facility or course in the list for the period of a maximum of five years. Applicants who do

not fulfil these requirements shall be informed of the refusal of the registration by formal Decision.

#### Article 25

(1) A training facility may, at the earliest one year and at the latest three months before expiry of the period of registration, in writing, request the maintenance of the registration for a further ten years. It shall remain registered in the list until the formal Decision concerning the application, filed on time, is made. Renewed applications to maintain the registration for a further ten year period are admissible.

(2) The registration shall be maintained if from the reports (article 27) of the training facility it is shown that the suitability is further guaranteed and none of the requirements of article 28 apply. In order to verify the requirements of the continued maintenance of the registration the Federal Minister of Justice may consult the Advisory Council.

#### Certificates

#### Article 26

The registered training institutions and the organisers of registered courses shall issue certificates concerning the achievement of the training goals.

#### Obligation to report

#### Article 27

The registered training institutions in order to prove the sustainability of their activity shall in writing report to the Federal Minister of Justice, at the latest by 1st of July of each year, on the extent, the contents and the success of the training over the past year.

#### Removal from the list of training institutions and courses

#### Article 28

(1) The Federal Minister of Justice shall remove a training institution or course from the list by formal Decision, if necessary by obtaining an opinion from the Advisory Council, if he is notified that one of the requirements of registration has ceased to apply or has not been met, the training goals have not in principle been met, issued certificates are repeatedly grossly incorrect, a training institution despite warning violates its obligation to report or if the sustainability of its activity is not guaranteed.

(2) Furthermore, a training facility or course shall be removed from the list in the case of withdrawal or the expiration of the time limit (article 25 Section 1).

(3) In the case of a removal the previous registration shall be kept on the record.

## Section VII

### Authorisation for issuance of a Regulation

#### Article 29

(1) The Federal Minister of Justice shall by Regulation stipulate the specific conditions for the training of mediators after consultation with the Advisory Council for Mediation. In the Regulation the training requirements may be differently defined dependant on the areas of professional expertise.

(2) The theoretical part, divided into specific training areas, shall contain 200–300 training units, the practical part shall contain 100–200 training units.

##### 1. The theoretical part:

a) An introduction to the history of problems and the development of mediation including their basic assumption and models;

b) Procedural development, methods and phases of mediation with special regard to dispute-oriented and solution-oriented approaches;

c) Basis of communication, in particular of communication-, problem- and negotiation techniques, the conduct of meetings and moderation with special regard to conflict situations;

- d) Conflict analysis;
- e) Practice areas of mediation;
- f) Theories of personality and psycho-social forms of intervention;
- g) Ethical problems in mediation, in particular the position of the mediator;
- h) Legal problems in mediation I, in particular relating to civil law, as well as legal problems in conflicts which are to be particularly considered for a mediation;

## 2. The practical part:

- a) Individual self-awareness and practical experience seminars to practise techniques of mediation through the use of role play, simulation and reflection;
- b) Peer group work;
- c) Case work and participation in practice supervision in the area of mediation.

(3) The training necessary for a professional group and the practical experience which has been acquired by its exercise shall be considered appropriately (article 10).

## Article 30

The Federal Minister of Justice, after consultation with the Advisory Council, shall by Regulation define the appropriate reimbursement for the chairman and the members of the Board taking into account the outlay incurred in connection with their activity.

## Section VIII

### Criminal provisions

## Article 31

(1) Any person who shall reveal or exploit facts in breach of his obligation of secrecy and confidentiality and thereby violates the legitimate interests of

another person shall be liable for prosecution by the court with a term of imprisonment of up to six months or a fine of up to 360 daily unit rates.

(2) The offender shall not be prosecuted if the revelation or exploitation, with regard to the content and form, is justified due to public or legitimate personal interest.

(3) The offender shall only be prosecuted on demand of the person whose interest to maintain secrecy has been breached.

## Article 32

In so far as the deed does not amount to an offence of a criminal nature, which falls within the jurisdiction of the courts, a breach of administration is committed, and is to be punished with a fine of up to EUR 3,500,

1. in the case where a person refers to himself as a registered mediator or uses a similar title which may confuse,

2. in the case where a person acts in breach of the provisions of articles 15 Sections 2, 16, 17, 19, 21 and 27.

## Section IX

### Final- and transitional provisions

## Article 33

(1) This Federal Law, in so far as not otherwise defined below, comes into effect on 1 May 2004.

(2) Section II becomes effective on the date subsequent to the publication.

(3) Section VI becomes effective on 1 January 2004.

(4) Applications in accordance with article 11 may be submitted and approved as from 1 March 2004; the registration in the List becomes first effective as of 1 May 2004.

(5) Regulations arising out of this Federal Law may be enacted as from the date of publication, they become effective at the earliest from the date of the coming into effect of the appropriate provision.

#### Article 34

Any person who submits an application for registration in the List of Mediators not later than 30 December 2004 and who has attended a theoretical and practical training in mediation of a total of at least 200 training units which, even if not comprehensive, but nevertheless as regards content is to be considered of equal status to a training in accordance with article 29, shall be considered professionally qualified.

#### Article 35

(1) The Trade Licence Act (Gewerbeordnung) 1994, BGBl. No. 194/1994 shall not apply to the activity of registered mediators.

(2) As far as provisions of other Federal Laws are referred to in this Federal Law, they shall be applied in their valid version.

#### Article 36

The Federal Minister of Justice is entrusted with the execution of this Federal Law.

#### 6.1.2 The European Directive<sup>736</sup>

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

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<sup>736</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, Official Journal L 136, 24/05/2008 P. 0003 – 0008.

Having regard to the Opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, inter alia, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.

(3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.



(6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

(9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

(11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.

(12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also

apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. This Directive should not, however, extend to attempts made by the court or judge seized to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seized requests assistance or advice from a competent person.

(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

(14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.

(15) In order to provide legal certainty, this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.

(16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.

(17) Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any

funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.

(18) In the field of consumer protection, the Commission has adopted a Recommendation [3] establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation.

(19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

(20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [4] or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [5].

(21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.

(22) This Directive should not affect the rules in the Member States concerning *enforcement of agreements resulting from mediation*.

(23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.

(24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive.

(25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

(26) In accordance with point 34 of the inter-institutional agreement on better law-making, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(27) This Directive seeks to promote the fundamental rights, and takes into account the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.

(28) Since the objective of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiary as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Directive.

(30) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

## Article 1

### Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to

revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

3. In this Directive, the term "Member State" shall mean Member States with the exception of Denmark.

## Article 2

### Cross-border disputes

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) *mediation is ordered by a court*;

(c) an obligation to use mediation arises under national law; or

(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

## Article 3

### Definitions

For the purposes of this Directive the following definitions shall apply:

(a) "Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the

assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) "Mediator" means any third person who is asked to conduct mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

#### Article 4

##### Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

#### Article 5

##### Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

## Article 6

### Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

## Article 7

### Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:



(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

## Article 8

### Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

## Article 9

### Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

## Article 10

### Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

## Article 11

### Review

Not later than 21 May 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

## Article 12

### Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011, with the exception of Article 10, for which the date of compliance shall be 21 November 2010 at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, these measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

## Article 13

### Entry into force

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

## Article 14

### Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 21 May 2008.

### 6.2 Institutions

#### 6.2.1 UNCITRAL

UNCITRAL Secretariat

Vienna International Centre

P.O. Box 500

A-1400 Vienna, Austria

Tel: +43 (1) 26060 4060 or 4061

Fax: +43 (1) 26060 5813

Website: <http://www.uncitral.org> (English, Spanish, French)

#### 6.2.2 ICC

International Chamber of Commerce

ICC Dispute Resolution Services – ADR

38 cours Albert 1er

75008 Paris, France

Tel: +33 1 4953 2905

Fax: +33 1 4953 2929

E-mail: [adr@iccwbo.org](mailto:adr@iccwbo.org)

Website: [www.iccwbo.org](http://www.iccwbo.org) (Website: English. Mediation Rules: English, German, French, Portuguese, Spanish, Russian)

### 6.2.3 LCIA

London Court of International Arbitration

70 Fleet Street

London EC4Y 1EU

United Kingdom

Tel: +44 (0)20 7936 7007

Fax: +44 (0)20 7936 7008

E-mail: [lcia@lcia.org](mailto:lcia@lcia.org)

Website: <http://www.lcia-arbitration.com/> (English)

### 6.2.4 SCCAM

Basel Chamber of Commerce

Aeschenvorstadt 67

P.O. Box

CH-4010 Basel

Tel: +41 61 270 60 50

Fax: +41 61 270 60 05

E-mail: [mediation@hkbb.ch](mailto:mediation@hkbb.ch)

Chamber of Commerce and Industry of Bern

Gutenbergstrasse 1

P.O. Box 5464

CH – 3001 Bern

Tel: +41 31 388 87 87

Fax: +41 31 388 87 88

E-mail: [info@bern-cci.ch](mailto:info@bern-cci.ch)

Chamber of Commerce, Industry and Services of Geneva

4, Boulevard du Théâtre

P.O. Box 5039

CH - 1211 Geneva 11

Tel: +41 22 819 91 11

Fax: +41 22 819 91 36

E-mail: [mediation@ccig.ch](mailto:mediation@ccig.ch)

Chamber of Commerce and Industry of Neuchâtel

4, rue de la Serre

P.O. Box 2012

CH – 2001 Neuchâtel

Tel: +41 32 722 15 15

Fax: +41 32 722 15 20

E-mail: [i-lex@cnci.ch](mailto:i-lex@cnci.ch)

Chamber of Commerce and Industry of Ticino

Corso Elvezia 16

P.O. Box 5399

CH-6901 Lugano

Tel: +41 91 911 51 11

Fax: +41 91 911 51 12

E-mail: [cciati@cci.ch](mailto:cciati@cci.ch)

Chamber of Commerce and Industry of Vaud

Avenue d'Ouchy 47

P.O. Box 315

CH - 1001 Lausanne

Tel: +41 21 613 35 35

Fax: +41 21 613 35 05

E-mail: [mediation@cvci.ch](mailto:mediation@cvci.ch)

Zurich Chamber of Commerce

Bleicherweg 5

P.O. Box 3058

CH - 8022 Zurich

Tel: +41 44 217 40 50

Fax: +41 44 217 40 51

E-mail: [direktion@zurichcci.ch](mailto:direktion@zurichcci.ch)

Website for all chambers: <https://www.sccam.org> (Website: English, German, French. Mediation Rules: English, German, Italian, French)

### **6.2.5 VIAC**

The Arbitral Centre of the Austrian Federal Economic Chamber

Wiedner Hauptstraße 63

Post Office Box 319

A-1045 Vienna

Tel: +43 (0) 5 90 900-4397, 4398, 4399

Fax: +43 (0) 5 90 900-216

E-mail: [arb@wko.at](mailto:arb@wko.at)

Website: <http://wko.at/arbitration> (English, German, Russian and Czech)

#### **6.2.6 CEDR**

Centre for Effective Dispute Resolution

International Dispute Resolution Centre

70 Fleet Street

London

EC4Y 1EU

United Kingdom

Tel: +44 (0) 20 7536 6000

Fax: +44 (0) 20 7536 6001

E-mail: [info@cedr.com](mailto:info@cedr.com)

Website: <http://www.cedr.com/> (English)

#### **6.2.7 MEDAL**

MEDAL may be contacted via MEDAL member organizations:

CEDR – see section 6.2.6 above.

ADR Center

Via del Babuino 114

00187 – Roma, Italy

Tel: +39 06 6938.0004

Fax: +39 06 6919.0408

E-mail: [info@adrcenter.it](mailto:info@adrcenter.it)

Website: <http://www.adrcenter.com> (English, Italian)

ACBMediation

Tel: +31 70 349 04 93

Website: [www.mediation-bedrijfsleven.nl](http://www.mediation-bedrijfsleven.nl)

CMAF

Tel: +33 (0) 1 44 95 11 40

Website: [www.cmap.fr](http://www.cmap.fr)

JAMS

Tel: +1 949 224 1810

Website: [www.jamsadr.com](http://www.jamsadr.com)

### 6.3 Institutional Rules

All institutional rules dealt with in this paper are available online on the respective homepage cited under section 6.2 above.

### 6.4 Model mediation clauses

#### 6.4.1 UNCITRAL<sup>737</sup>

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the

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<sup>737</sup> UNCITRAL model conciliation clause is contained in the UNCITRAL Rules, available at <http://www.uncitral.org/pdf/english/texts/arbitration/conc-rules/conc-rules-e.pdf>.



conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

#### **6.4.2 ICC<sup>738</sup>**

##### **6.4.2.1 Optional ADR clause**

The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC ADR Rules.

##### **6.4.2.2 Obligation to consider ADR clause**

In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider submitting the matter to settlement proceedings under the ICC ADR Rules.

##### **6.4.2.3 Obligation to submit dispute to ADR with an automatic expiration mechanism clause**

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, the parties shall have no further obligations under this paragraph.

##### **6.4.2.4 Obligation to submit dispute to ADR, followed by ICC arbitration as required clause**

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute shall be finally settled under the Rules of Arbitration of the International Chamber of

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<sup>738</sup> ICC model clauses are available at <http://www.iccwbo.org/court/adr/id5346/index.html>.

Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

#### **6.4.3 LCIA<sup>739</sup>**

##### **6.4.3.1 Mediation**

In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause.

##### **6.4.3.2 Mediation and arbitration**

In the event of a dispute arising out of or relating to this contract, including any question regarding its existence, validity or termination, the parties shall first seek settlement of that dispute by mediation in accordance with the LCIA Mediation Procedure, which Procedure is deemed to be incorporated by reference into this clause.

If the dispute is not settled by mediation within ... [specify time period] days of the commencement of the mediation, or such further period as the parties shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The language to be used in the mediation and in the arbitration shall be ... [specify language].

The governing law of the contract shall be the substantive law of ... [specify country].

In any arbitration commenced pursuant to this clause, (i) the number of arbitrators shall be ... [specify number, one/three]; and (ii) the seat, or legal place, of arbitration shall be ... [specify city and/or country].

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<sup>739</sup> LCIA model clauses are available at <http://www.lcia-arbitration.com/>.

#### **6.4.4 SCCAM<sup>740</sup>**

##### **6.4.4.1 Mediation**

Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce in force on the date when the request for mediation was submitted in accordance with these Rules.

The seat of the mediation shall be ... [city in Switzerland, unless the parties agree on a city abroad], although the meetings may be held in ... [specify place].

The mediation proceedings shall be conducted in ... [specify desired language].

##### **6.4.4.2 Mediation and arbitration**

Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce in force on the date when the request for mediation was submitted in accordance with these Rules.

The seat of the mediation shall be ... [city in Switzerland, unless the parties agree on a city abroad], although the meetings may be held in ... [specify place].

The mediation proceedings shall be conducted in ... [specify desired language].

If such dispute, controversy or claim has not been fully resolved by mediation within 60 days from the date when the mediator(s) has (have) been confirmed or appointed by the Chambers, it shall be settled by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of

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<sup>740</sup> Swiss Chambers' Court of Arbitration and Mediation model clauses are available at <https://www.sccam.org/sm/en/rules.php>.

Commerce in force on the date when the Notice of Arbitration was submitted in accordance with those Rules.

The number of arbitrators shall be ... [one or three];

The seat of the arbitration shall be in ... [city in Switzerland, unless the parties agree on a city abroad];

The arbitral proceedings shall be conducted in ... [specify desired language].

The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties].

#### 6.4.5 VIAC

VIAC does not offer a conciliation clause.<sup>741</sup>

#### 6.4.6 CEDR

CEDR's model mediation agreement contains five pages and is – together with other model documents - available for download on the CEDR homepage.<sup>742</sup>

#### 6.4.7 MEDAL

The MEDAL Rules do not contain a model mediation clause. Model mediation clauses are available via MEDAL member organisations, including CEDR and ADR Center.

#### 6.5 Curriculum Vitae

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<sup>741</sup> An arbitration clause is available at <http://wko.at/arbitration/>.

<sup>742</sup> [http://www.cedr.com/about\\_us/library/documents.php](http://www.cedr.com/about_us/library/documents.php).

Mag. Evelyn ZACH, LL.M. (EHI), M.A. (Mediation)

#### **PERSÖNLICHE DATEN**

**Adresse** 1020 Wien, Ennsgasse 18/DG 4  
**Nationalität** Österreich  
**Geburtsdatum** 29.1.1980  
**Telefon** +43 650 555 20 88  
**Email** evi-z@gmx.at



#### **BERUFSERFAHRUNG**

2/2008 bis dato Mitarbeiterin bei der ersten unentgeltlichen anwaltlichen Mediationsauskunft, Rechtsanwaltskammer/Anwaltliche Vereinigung Mediation, Wien  
1/2005 bis dato Rechtsanwaltsanwärtlerin, WOLF THEISS Rechtsanwälte GmbH, Wien  
10/2002-6/2003 Rechtspraktikantin, Oberlandesgerichtssprengel Graz  
10/2001-2/2002 Trainee, Rechtsanwalt Dr. Rudolf Grassler, Graz

#### **BERUFLICHE WEITERBILDUNG**

5/2008 CPR European Congress on Business Dispute Management, Wien  
3/2007-4/2008 Master of Arts 'M.A. (Mediation)', ARGE Bildungsmanagement, Wien  
11/2007 Rechtsanwaltsprüfung, Wien  
10/2005-2/2007 'Diplom Mediation' nach Zivilrechts-Mediationsgesetz, ARGE Bildungsmanagement, Wien

#### **AUSBILDUNG**

10/2007 bis dato Doktoratstudium, Universität Wien  
7/2004-8/2004 'Mediation Diploma', Summer School on ADR in International Disputes: Negotiation, Mediation, Arbitration, Humboldt Universität zu Berlin & Tulane University Law School, Berlin, Deutschland  
9/2003-11/2004 Master in European, International and Comparative Studies, 'LL.M.', European University Institute, Florenz, Italien

- |                |   |
|----------------|---|
| 7/2003-8/2003  | International Symposium on Mediation and Conflict Resolution, Erasmus University Rotterdam & George Washington University's Elliott School of International Affairs & International Institute on Mediation and Conflict Resolution (IIMCR), Den Haag, Niederlande |
| 2/2003-3/2003  | 'NLP-Practitioner', Trinergy International, Wien  |
| 5/2003         | Symposium über Mediation, Karl-Franzens-Universität Graz & Joanneum Research, Graz  |
| 10/1998-6/2002 | Studium der Rechtswissenschaften, 'Mag. jur.', Karl-Franzens-Universität Graz   |
| 3/2002-6/2002  | Forschungsstudentin, University of Bristol & University of Cambridge, Bristol, Cambridge, England   |
| 9/1986-6/1998  | Bundes-Oberstufenrealgymnasium, Hauptschule, Volksschule, Deutschlandsberg, Frauental   |

#### **SPRACHKENNTNISSE**

- |             |                     |
|-------------|---------------------|
| Deutsch     | Muttersprache       |
| Englisch    | Verhandlungsfähig   |
| Italienisch | Schrift und Sprache |

#### **PUBLIKATIONEN UND KONFERENZEN**

Taking the Best from Mediation Regulations – The EC Mediation Directive and the Austrian Mediation Act in Arbitration International, Vol. 23, No. 4 (2007) 663 et seq.

Österreich fällt bei Mediation zurück in Der Standard, Ressort Wirtschaft und Recht, 4 Juni 2008, 30

Vortragende, European Mediation Conference, Wien (9/2007)

#### **STIPENDIEN**

- |           |   |
|-----------|---|
| 2003/2004 | Postgraduierten-Stipendium, Bundesministerium für Bildung, Wissenschaft und Kultur  |
| 2002/2003 | Leistungsstipendium, Karl-Franzens-Universität Graz   |
| 2001-2004 | Stipendien für Seminare und Forschungsaufenthalte, Karl-Franzens-Universität Graz, Institut für Internationale Beziehungen, Amt der Steiermärkischen Landesregierung, European University Institute |

## 6.6 Abstract (English)

Not only multinational companies but also states and international organisations have recognized the value of methods for settling commercial disputes through involvement of a third neutral person assisting them in their attempt to settle their dispute amicably. Mediation proceedings permit the parties to seek a high quality amicable solution to their disputes using a minimum of time and resources. They are intended to be party-controlled, rapid, inexpensive and flexible. Although the process should be as flexible as possible, parties often find it helpful to refer to a procedural framework provided by a set of established rules, like the UNCITRAL, ICC, LCIA, SCCAM, VIAC, CEDR or MEDAL mediation procedure, to bring shape and discipline to the process. Institutional mediation rules refer to the entire mediation process from the initiation until the termination. Apart from institutional rules, which are not part of a national legislation, mediation is often not subject to any domestic procedural law. Especially in Europe, yet, few national laws on mediation exist. This situation will change within the next years. The European Parliament and the Council of the European Union have enacted the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. According to the Mediation Directive, all Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Mediation Directive before 21 May 2011. Therefore, Member States are now required to deal with the question of whether its legal system reflects the content of the Mediation Directive. Members of the European Union must in particular adopt procedures to enforce mediation settlement agreements, protect the confidentiality of mediation communications, provide for regulations on suspension of limitation periods and promote training of mediators under the Mediation Directive. The Mediation Directive is intended to increase access to justice by providing an additional mechanism for resolving disputes. Even though there are considerable efforts underway to make mediation more popular within the environment of international dispute settlement, there is still a long way to go to.

This thesis first deals with the question which basic considerations, should be borne in mind when deciding about the method of resolving disputes. Such

basic considerations include amongst others the choice between different dispute settlement methods, timing, professional assistance, persons involved in the dispute settlement process, rules of procedure and enforcement of a settlement agreement (section 2). Secondly, this paper follows the development of statutory and institutional mediation rules for international dispute settlement. It offers insights into the provisions of the Austrian Act on Mediation in Civil Matters<sup>743</sup>, the Mediation Directive and discusses the provisions of the Mediation Act in light of the requirements of the Mediation Directive (section 3). Thirdly, it describes several institutional rules including those of UNCITRAL, ICC, LCIA, SCCAM, VIAC, CEDR and MEDAL presenting in an analytical and clear manner the relations and differences behind these mediation provisions (section 4).

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<sup>743</sup> Act on Mediation in Civil Matters (Zivilrechts-Mediations-Gesetz, ZivMediatG - hereinafter "Mediation Act") BGBl I 2003/29.



## 6.7 Abstract (German)

Nicht nur international agierende Unternehmen, auch Staaten und Internationale Organisationen greifen immer häufiger auf eine dritte, neutrale Instanz zur gütlichen Beilegung von wirtschaftlichen Streitigkeiten zurück. Mediation erlaubt es den Parteien deren Streitigkeiten eigenverantwortlich, schnell, kostengünstig und flexibel zu lösen. Was ist nun aber zu beachten, wenn man ein Mediationsverfahren einleiten möchte oder eine Mediationsklausel in ein Vertragsdokument inkludiert wird? Gibt es gesetzliche Regeln die beachtet werden müssen? Kann man auf Verfahrensregeln zurückgreifen? Wo findet man einen qualifizierten Mediator? Kann man eine Mediationsvereinbarung oder das Ergebnis einer Mediation vollstrecken? Diese und viele andere Fragen werden sich Parteien einer Mediation stellen. Die vorliegende Arbeit beschäftigt sich unter Kapitel 2 mit allgemeinen Fragen, die sich Parteien, Parteienvertreter und Mediatoren vor, während und nach der Mediation stellen sollten. In Kapitel 3 wirft die Autorin einen Blick auf die in Österreich gültigen gesetzlichen Regelungen sowie die Richtlinie der Europäischen Union, welche im Mai 2011 in Kraft tritt. Darüber hinaus wirft die Autorin unter Kapitel 5 einen kritischen Blick auf die Verfahrensregeln über Mediation von Organisationen wie UNCITRAL, ICC, LCIA, SCCAM, VIAC, CEDR oder MEDAL. Anhand von 14 wesentlichen Fragestellungen vergleicht und untersucht die Autorin die unterschiedlichen Verfahrensregeln.

## 7. Abbreviations

AAA	American Arbitration Association
ABGB	Austrian Civil Code (Österreichisches Allgemein bürgerliches Gesetzbuch)
ACICA	Australian Centre for International Commercial Arbitration
ADR	Alternative Dispute Resolution
ADR Center	Alternative Dispute Resolution Center
AnwBI	Austrian Attorneys' Journal (Österreichisches Anwaltsblatt)
BCICAC	British Columbia International Commercial Arbitration Centre
BGBI	Austrian Federal Law Gazette (Österreichisches Bundesgesetzblatt)
CAMCA	Commercial Arbitration and Mediation Center for the Americas
CEDR	Centre for Effective Dispute Resolution
CMAP	Centre for Mediation and Arbitration of Paris
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
dRGBI	German Empire Law Gazette (Deutsches Reichsgesetzblatt)
ed.	Editor
EheRÄG 1999	Amendment to the Matrimony Law

	(Eherechtsänderungsgesetz)
EO	Enforcement Act (Exekutionsordnung)
et al.	And others
et seq.	and following
GewO	Trading Regulations (Gewerbeordnung)
HKIAC	Hong Kong International Arbitral Centre
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICDR	International Centre for Dispute Resolution
LCIA	London Court of International Arbitration
MEDAL	The International Mediation Services Alliance
mn	Marginal note
NAFTA	North Atlantic Free Trade Agreement
OGH	Austrian Supreme Court (Österreichischer Oberster Gerichtshof)
SCCAM	Swiss Chambers' Court of Arbitration and Mediation
SchiedsVZ	German Arbitration Journal (Zeitschrift für das Schiedsverfahren)
StBG	Criminal Code (Strafgesetzbuch)
StPO	Criminal Procedure Code (Strafprozessordnung)
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vienna International Arbitral Centre

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## 8.2 Laws and regulations

All Austrian laws and regulations are available on the website of the department of the federal chancellor at <http://ris.bka.gv.at/jus/>. A limited list of Austrian laws in English is available at, [http://www.ris.bka.gv.at/hilfe/erv/law\\_list.html](http://www.ris.bka.gv.at/hilfe/erv/law_list.html). Government bills and corresponding statements are available on the website of the Austrian Parliament at [www.parlinkom.gv.at](http://www.parlinkom.gv.at). European law is available on the website of the European Union at <http://eur-lex.europa.eu/>. UNCITRAL texts and statutes on arbitration and conciliation are available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html).

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### 8.3 Webpages

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[www.bcicac.com](http://www.bcicac.com)

[www.camsantiago.com](http://www.camsantiago.com)

[www.cedr.co.uk](http://www.cedr.co.uk)

[www.cmap.fr](http://www.cmap.fr)

[www.cpradr.org](http://www.cpradr.org)

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<http://eur-lex.europa.eu>

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[www.hkiac.org](http://www.hkiac.org)

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[www.medal-mediation.com](http://www.medal-mediation.com)

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<http://wko.at/arbitration>